Feb 8 Argued – Mr. Ballance
Feb. 16 – aff'd Clifford

SUPREME COURT OF THE UNITED STATES.

No. ~~222.~~ 134.

JAMES BARTON, PLAINTIFF IN ERROR,

vs.

ROBERT FORSYTH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

GOVERNMENT PRINTING OFFICE.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-room, in the city of Chicago, in the district aforesaid, before the Hon. Thomas Drummond, district judge of said district, and in the absence pro tempore of the Hon. David Davis, one of the justices of the Supreme Court of the United States, sole judge of said circuit court, on Tuesday, the ninth day of August, in the July term of said court, in the year of our Lord one thousand eight hundred and sixty-four, and of our independence the eighty-ninth.

WM. H. BRADLEY, *Clerk.*

ROBERT FORSYTH
vs. } In ejectment.
JAMES BARTON.

DISTRICT OF ILLINOIS, *ss:*

Be it remembered, that on the twenty-sixth day of December, in the year of our Lord one thousand eight hundred and fifty, came Robert Forsyth, plaintiff, by his attorney, H. O. Merriman, and filed in the office of the 2 clerk of the circuit court of the United States for the district of Illinois, at Springfield, in said district, his declaration in ejectment against James Barton, defendant, together with a notice and an affidavit attached to the same; which said declaration, notice, and affidavit are in the words and figures following, to wit:

3 UNITED STATES OF AMERICA, *District and State of Illinois:*

In the circuit court of the United States in and for the district and State of Illinois, of the December term, in the year of our Lord one thousand eight hundred and fifty.

Robert Forsyth, plaintiff in this suit, citizen of the State of Missouri, one of the United States of America, complains of James Barton, defendant in this suit, who is a citizen and inhabitant of the State of Illinois, in the United States of America, of a plea, wherefore he, the said defendant, with force and arms, &c., entered into the following described premises—for that heretofore, to wit, on the first day of October, in the year of our Lord one thousand eight hundred and fifty, the said plaintiff was possessed of certain premises, situated in the county of Peoria, in the said State of Illinois, and described as follows, to wit, claim No. twenty-seven, in the village of Peoria and State of Illinois, confirmed to the legal representatives of Michael La Croix by the confirmatory act of Congress, approved 3rd March, 1823, entitled An act to confirm certain claims to lots in the village of Peoria, in 4 the State of Illinois, and was described as follows, to wit, the lot containing twenty-seven thousand four hundred and forty-nine square feet and seven hundredths of a square foot, surveyed and designated as covered by said claim number twenty-seven, in the southeast fractional quarter of fractional section nine, in township eight north, of range eight east of the fourth principal meridian, Illinois, according to the survey approved 1st September, 1840, by the surveyor of the public lands in the State of Illinois and Missouri; and being so possessed thereof the said defendant afterwards, to wit, on the thirtieth day of November, in the year of our Lord one thousand eight hundred and fifty, entered into such premises, and that he unlawfully withholds from the plaintiff the possession thereof. And said plaintiff avers that he claims title to said premises in fee, and that said plaintiff is a citizen and inhabitant of the State of Missouri, in the United States of America, and that he, the said defendant, is a citizen and inhabitant of the State of Illinois, in the United States of America. And said plaintiff further avers that the aforedescribed premises being the matter in dispute, exceed, exclusive of costs, the sum or value of five hundred dollars.

Wherefore said plaintiff say that he is injured and has sustained damages to a large amount, to wit, one thousand dollars. And therefore he sues, &c.

H. O. MERRIMAN, *Attorney for Plaintiff.*

5 To the above-named defendant: Take notice that, 1, on the seventh day of the December term of the circuit court of the United States, within and for the district and State of Illinois, now in session at the city of Springfield, in said State of Illinois, and on the ninth day of December, A. D. one thousand eight hundred and fifty, or as soon thereafter as counsel can be heard, a declaration, of which the above is a copy, will be filed in said court; 2, that upon filing the same a rule will be entered requiring you, such defendant, to appear and plead to such declaration within twenty days after the entry of such rule; 3, that if you neglect so to appear and plead a judgment by default will be entered against you, and the plaintiff will recover possession of the premises described in said declaration.

Dec. 3, 1850. Yours, &c.,

H. O. MERRIMAN, *Attorney for Plaintiff.*

STATE OF ILLINOIS, *County of Peoria, ss:*

Bernard Duke, being first duly sworn, deposes and says that on this day he served the within declaration on the within-named James Barton by delivering to him personally a copy of the within declaration and notice.

B. D. DUKE.

Subscribed and sworn to before me, clerk of circuit court of said county, this day. Witness my hand and seal of said court this 3rd day of December, A. D. 1850.

[SEAL.] JACOB GALE, *Clerk.*

Endorsed: Filed Dec. 26, 1850.

WM. POPE, *Cl.*

6 On the same day, to wit, the 26th day of December, in the December term of said court, A. D. 1850, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

ROBERT FORSYTH
vs. } Ejectment.
JAMES BARTON.

This day came the plaintiff, by his attorney, and filed his declaration in ejectment and the notice in writing thereto attached, and upon reading and filing an affidavit of a due service of a true copy of said declaration and notice upon said defendant it is ordered, on motion of said plaintiff, by his attorney, that defendant plead thereto in twenty days or that his default be entered.

On this day, to wit, the 30th day of December, A. D. 1850, came said defendant, by Powell & Johnson, his attorneys, and filed in said clerk's office his plea in said entitled cause; which said plea is in the words and figures following, to wit:

Circuit court, United States, district of Illinois, December term, A. D. 1850.

7 ROBERT FORSYTH
vs.
JAMES BARTON.

And the said defendant, by Powell & Johnson, his attorneys, comes and defends the force and injury when, &c., and says that he is not guilty of unlawfully withholding the premises claimed by the plaintiff as alleged in his said declaration. And this he prays may be enquired of by the country.

POWELL & JOHNSON.

Endorsed: Filed Dec. 30, 1850.

WM. POPE, *Clk.*

On this day, to wit, the 21st day of July, in the July term, A. D. 1852, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

ROBERT FORSYTH
vs. } Ejectment.
JAMES BARTON.

This day came the parties, by their attorney, and the argument of this cause having occupied the court until the hour of adjournment, it is ordered that the further argument be continued until 9 of the clock to-morrow morning.

8 On this day, to wit, the 22d day of July, in the term of said court last aforesaid, A. D. 1852, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

ROBERT FORSYTH
vs. } Ejectment.
JAMES BARTON.

This day came again the parties, by their attorneys, and concluded the argument of this cause, and the court not being sufficiently advised in the premises took time to consider.

On this day, to wit, the 17th day of January, A. D. 1853, in the December term, A. D. 1852, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

ROBERT FORSYTH
vs. } Ejectment.
JAMES BARTON.

This day came the parties, by their attorneys, and this cause having been argued at the last July term and no decision given, by agreement
9 each party had the right to produce additional testimony, and after the introduction of said testimony, the argument thereupon having continued until the time of adjournment, it is ordered that the further argument be continued until 9 of the clock to-morrow morning.

On this day, to wit, on the 18th day of January, A. D. 1853, in the term last aforesaid of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

ROBERT FORSYTH
vs. } Ejectment.
JAMES BARTON.

This day came the parties, by their attorneys, and concluded the argument of this cause, and the court not being sufficiently advised in the premises took time to consider.

On this day, to wit, the 19th day of January, A. D. 1853, in the December term, A. D. 1852, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

10 ROBERT FORSYTH
vs. } Ejectment.
JAMES BARTON.

This day came the parties, by their attorneys, and the court being now sufficiently advised in the premises finds the defendant "not guilty."

It is therefore considered and adjudged that the said defendant recover from the plaintiff his costs and charges in his defense herein expended, and that he have execution therefor.

On this day, to wit, the first day of February, A. D. 1853, in the December term, A. D. 1852, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

Robert Forsyth
vs. Ejectment.
James Barton.

This day came the plaintiff, by his attorneys, and moved the court to grant him a new trial, under the provisions of the statute in such cases made and provided; and it appearing to the satisfaction of the court that all the damages and costs recovered and taxed in this cause have been paid, it is ordered that the judgment rendered herein, at the present term of
11 this court, be vacated, set aside, and for nothing held, and that this
cause be reinstated on the docket, and a new trial had herein.

On this day, to wit, the third day of July, in the July term, A. D. 1855, of said court, for the northern district of Illinois, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

Robert Forsyth
vs. Ejectment.
James Barton.

Now, at this day come the parties, by their attorneys, and upon issue joined thereupon come a jury of good and lawful men, to wit, Nathan Allen, M. S. Johnson, George W. Prickett, Joseph Johnson, A. M. Braley, A. J. Haviland, George E. Corwin, M. Ryan, William M. Fry, Fenner Aldridge, James L. Taylor, and L. Dearborn, who were duly elected, tried, and sworn, and after hearing the evidence, the jury, without retiring from the court-room, returned the following verdict, to wit: We, the jury, find the defendant guilty of unlawfully withholding from the plaintiff the following described
12 land and premises, to wit, situated in the county of Peoria and State
of Illinois, and described as follows, to wit, claim No. twenty-seven, in the village of Peoria, in the State of Illinois, confirmed to the legal representatives of Michael La Croix by the confirmatory act of Congress, approved 3d March, 1823, entitled An act to confirm certain claims to lots in the village of Peoria, in the State of Illinois, and described as follows, to wit, the lot containing twenty-seven thousand four hundred and forty-nine square feet and seven hundredths of a square foot, surveyed and designated as covered by said claim number twenty-seven, in the southeast fractional quarter of fractional section nine, in township eight north, of range eight east of the fourth principal meridian, Illinois, according to the survey approved 1st September, 1840, by the surveyer of the public lands in the States of Illinois and Missouri, and we find the estate established on the trial in the plaintiff to be an estate in fee simple, and assess his damages at one cent. And the defendant, by his attorney, move the court for a new trial of this cause.

On this day, to wit, the 6th day of July, in the July term, A. D.
13 1855, of said court, in the record of the proceedings thereof in said
entitled cause is the following entry, to wit:

Robert Forsyth
vs. Ejectment.
James Barton.

Now, at this day came on to be heard the motion of the defendant, heretofore filed by his attorney for a new trial of this cause; which motion, after argument by counsel, is taken under advisement by the court.

On this day, to wit, the 7th day of July, in the July term, A. D. 1855, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

ROBERT FORSYTH
vs. Ejectment.
JAMES BARTON.

The court having fully considered and being now fully advised upon the motion of the defendant for a new trial of this cause, and being divided in opinion, the said motion is overruled.

14 On this day, to wit, the 9th day of July, in the July term, A. D. 1855, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

ROBERT FORSYTH
vs. Ejectment.
JAMES BARTON.

The plaintiff, by his attorney, comes and moves the court for judgment upon the finding of the jury, heretofore found and returned herein.

On this day, to wit, the 17th day of January, A. D. 1856, in the December term, A. D. 1855, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

ROBERT FORSYTH
vs. Ejectment.
JAMES BARTON.

The plaintiff, by his attorney, moves the court for judgment upon the verdict heretofore found and returned, and the defendant, by his attorney, moves the court in arrest of judgment.

On this day, to wit, the 22d day of January, A. D. 1856, in the De-
15 cember term, A. D. 1855, of said court, in the record of the proceed-
ings thereof in said entitled cause is the following entry, to wit:

ROBERT FORSYTH
vs. Ejectment.
JAMES BARTON.

The court overrules the motion of the defendant heretofore entered herein, in arrest of judgment, and sustains the motion of the plaintiff heretofore filed by his attorney, for judgment upon the verdict of the jury heretofore found and returned. It is therefore considered and adjudged by the court that the plaintiff have and recover of and from the defendant possession of the land and premises described in his declaration, to wit, situated in the county of Peoria, in the State of Illinois, and known and described as claim No. twenty-seven in the village of Peoria and State Illinois, confirmed to the legal representatives of Michael La Croix by the confirmatory act of Congress, approved 3d March, 1823, entitled An act to confirm certain claims to lots in the village of Peoria, in the State of Illinois, and described as follows, to wit, the lot containing twenty-seven thousand four hundred and forty-nine
16 square feet and seven hundredths of a square foot, surveyed and des-
ignated as covered by said claim number twenty-seven, in the southeast fractional quarter of fractional section nine, in township eight north, of range eight east of the fourth principal meridian, Illinois, according to the survey approved 1st September, 1840, by the surveyor of the public lands in the States of Illinois and Missouri, and that he have a writ of possession therefor, and that he also have and recover of and from the defendant the sum of one cent, his damages as aforesaid assessed by the jury, together with his costs and charges by him about his suit in this behalf expended, amounting to the sum of   dollars and   cents, and that he have execution therefor.

On this day, to wit, the 23d day of January, A. D. 1856, in the December term, A, D. 1855, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

17 ROBERT FORSYTH }
vs. } Ejectment.
JAMES BARTON. }

The defendant, by his attorney, comes and moves the court to vacate the judgment yesterday entered against the defendant herein, and to grant him a new trial under the statute. And it appearing satisfactorily to the court that all of the taxed costs herein have been paid by the defendant, it is thereupon considered by the court that said judgment be vacated, set aside, and for nothing held, and that a new trial be had of the cause.

On this day, to wit, the 11th day of July, in the July term, A. D. 1856, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

ROBERT FOSYTH }
vs. } Ejectment.
JAMES BARTON. }

Now, at this day come the parties, by their attorneys, and upon issues joined thereupon come a jury of good and lawful men, to wit: Daniel P.
Holt, Rufus Ordway, Daniel Bedee, Erastus Torry, William McKee,
18 A. B. Coon, William Henry, M. Taggart, Peter Stout, William W.
Crandle, Thomas Barnett, and H. W. Harwood, who were duly elected, tried, and sworn, and after hearing the evidence and a part of the arguments of counsel, the concluding arguments of counsel are postponed until to-morrow morning.

On this day, to wit, the 12th day of July, in the July term, A. D. 1856, of said court, in the record of the proceedings thereof in said entitled cause is *is* the following entry, to wit:

ROBERT FORSYTH }
vs. } Ejectment.
JAMES BARTON. }

The jury heretofore empannelled in this cause this morning returned into court, and now come again the parties, by their attorneys, and after hearing the concluding arguments of counsel and receiving instructions from the court, the jury retired to consider of their verdict, and after a short absence they returned into court with the following verdict, to wit: We, the jury, find the
defendant guilty of unlawfully withholding from the possession of
19 the plaintiff the land and premises described in his declaration, to
wit, the following certain premises, situated in the county of Peoria and State of Illinois, described as follows, to wit, claim number twenty-seven in the village of Peoria and State of Illinois, confirmed to the legal representatives of Michael La Croix by the confirmatory act of Congress, approved 3d March, 1823, entitled An act to confirm certain claims to lots in the village of Peoria, in the State of Illinois, and described as follows, to wit, the lot containing twenty-seven thousand four hundred and forty-nine square feet and seven hundredths of a square foot, surveyed and designated as covered by said claim number twenty-seven, in the southeast fractional quarter of fractional section nine, in township eight north, of range eight east of the fourth principal meridian, Illinois, according to the survey approved 1st September, 1840, by the surveyor of the public lands in the States of Illinois and Missouri. We also find the estate established in the plaintiff on the trial to be an estate in fee simple, and we assess the damages of the plaintiff at the sum of one cent. It is thereupon considered by the court

that the plaintiff have and recover of and from the defendant posses-
20 sion of said described land and premises according to the force, form, or
and effect of his said recovery, and that he have a writ of possession
therefor, and that he also have and recover of the defendant the said sum
of one cent, his damages so as aforesaid assessed, together with his costs
and charges by him about his suit in this behalf expended, amounting to the
sum of dollars and cents, and that he have execution therefor.

On this day, to wit, the 24th day of July, A. D. 1856, came said defendant, by his attorney, and filed in the office of the clerk of said court his copy of writ of error in said entitled cause; which said copy is in the words and figures following, to wit:

UNITED STATES OF AMERICA, *Northern District of Illinois, ss:*

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a
21 judgment, in a plea which is in the said court before you, between
Robert Forsyth, plaintiff, and James Barton, defendant, a manifest
error hath happened, to the great damage of the said James Barton, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Roger B. Taney, chief justice of the Supreme Court of
the United States, this 24th day of July, A. D. 1856, and of our inde-
22 pendence the 81st year.

[SEAL.] WILLIAM H. BRADLEY, *Clerk.*

Copy of writ of error filed in pursuance of the statute of the United States in such case made and provided for the above-named Robert Forsyth, def't in error.

C. BALLANCE, *Attorney for Pl'ff in Error.*

Endorsed: Filed July 24th, 1856.

WM. H. BRADLEY, *Cl'k.*

On the same day, to wit, the 24th day of July, A. D. 1856, came said defendant, by his attorney, and filed in said clerk's office his appeal bond in said entitled cause; which said appeal bond is in the words and figures following, to wit:

U. S. circuit court, northern district of Illinois, July term, A. D. 1856.

ROBERT FORSYTH
vs. } In ejectment.
JAMES BARTON.

Know all men by these presents that we, the undersigned, Charles
23 Ballance and Elihu N. Powell, both of Peoria, are held and firmly
bound unto Robert Forsyth, of St. Louis County, Missouri, in the
penal sum of two thousand dollars, lawful money of the United States, for the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly, severally, firmly by these presents.

The condition of the above obligation is such that whereas the above-named plaintiff did at the present term of said court recover a judgment against said defendant for certain real estate in the city of Peoria, which is fully described and set forth in the declaration in said cause; and whereas said Barton was a transient person, having no interest in said premises only as a temporary tenant; and whereas said Charles Ballance is the landlord of of said premises, and has been defending said suit for his own benefit, and has this day sued out a writ of error to the Supreme Court of the United States, to obtain the reversal of said judgment: Now, therefore, if the said defendant or said Ballance in his name shall prosecute said writ of error with effect and without delay, and answer all damages and costs, if
24 he fail to make his said plea good, then the above obligation to be null and void; but otherwise, to remain in full force and virtue.

Witness our hands and seals this 22 day of July, 1856.

C. BALLANCE. [SEAL.]
E. N. POWELL. [SEAL.]

Endorsed: July 24, 1856, security approved.

THOMAS DRUMMOND.

Filed July 24th, 1856.

WM. H. BRADLEY, *Cl'k.*

On the 7th day of July, A. D. 1858, the mandate from the Supreme Court of the United States in said entitled cause was filed in said clerk's office; which said mandate is in the words and figures following, to wit:

25 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Whereas lately in the circuit court of the United States for the northern district of Illinois, before you or some of you, in a cause between Robert Forsyth, plaintiff, and James Barton, defendant, the judgment of the said circuit court was in the following words, viz: "It is thereupon considered by the court that the plaintiff have and recover of and from the defendant possession of said described land and premises, according to the force, form, and effect of his said recovery, and that he have a writ of possession therefor, and that he also have and recover of the defendant the said sum of one cent, his damages so as aforesaid assessed, together with his costs and charges by him about his suit in this behalf expended, amounting to the sum of dollars and cents, and that he have execution therefor," as by the inspection of the transcript of the record of the said circuit court, which was brought into the Supreme Court of the United States by
26 virtue of a writ of error, agreeably to the act of Congress in such case made and provided, fully and at large appears. And whereas in the present term of December, in the year of our Lord one thousand eight hundred and fifty-seven, the said cause came on to be heard before the said Supreme Court on the said transcript of the record, and was argued by counsel; on consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed, with costs, and that the said plaintiff recover against the said defendant, James Barton, one hundred and twenty-two dollars and fifty-one cents for his costs herein expended, and have execution therefor, May 18th:

You therefore are hereby commanded that such execution and proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said writ of error notwithstanding.

Witness the Honorable Roger B. Taney, chief justice of said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and fifty-seven.

[SEAL.] WM. THOS. CARROLL,
Clerk of the Supreme Court of the United States.

Endorsed: Filed July 7th, 1858.
WM. H. BRADLEY, *Cl'k.*

27 On this day, to wit, the seventh day of July, in the July term, A. D. 1858, of said court in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

ROBERT FORSYTH
vs. } Ejectment.
JAMES BARTON.

The plaintiff comes, by Messrs. Williams, Grimshaw & Williams, his attorneys, and files the mandate of the Supreme Court herein, affirming the judgment of this court and directing that execution and proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had. It is thereupon ordered by the court that the plaintiff have a writ of possession and execution against the defendant in accordance with the judgment heretofore, to wit, on the twelfth day of July, in the July term, A. D. 1856, of this court rendered against the said defendant, and that he also have execution against the said defendant for the costs taxed in said Supreme Court and filed with said mandate, amounting to the sum of one hundred and twenty-two dollars and fifty-one cents, together with the costs of this court.

28 On this day, to wit, on the 13th day of October, in the adjourned October term, A. D. 1862, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

ROBERT FORSYTH
v. } Ejectment.
JAMES BARTON.

Now comes the defendant, by Charles Ballance, esq., his attorney, and moves the court for a writ of restitution herein, and the court after hearing the arguments on the part of the defendant, takes the same under advisement.

On this day, to wit, the 15th day of May, in the adjourned May term, A. D. 1863, of said court, in the record of the proceedings thereof in the said entitled cause is the following entry, to wit:

ROBERT FORSYTH
v. } Ejectment.
JAMES BARTON.

Now comes the defendant, by his attorney, and on affidavits filed
29 moves the court that a writ of restitution be awarded him in this behalf; and the court having considered and being fully advised on said
motion, orders that a writ of restitution issue herein.

} Restitution to
} Barton

On this day, to wit, on the 17th day of July, in the July term, A. D. 1863, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

ROBERT FORSYTH
v. } Ejectment.
JAMES BARTON.

Now comes the plaintiff, by W. C. Goudy, esq., his attorney, and moves the court for a writ of restitution for a part of the real estate and premises herein.

On this day, to wit, the 28th day of July, in the July term, A. D. 1863, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

ROBERT FORSYTH }
v. } Ejectment.
JAMES BARTON. }

The motion of the plaintiff, by his attorney, for a writ of restitution is postponed until the October term of this court, upon filing a bond by Mr.
30 Ballance on behalf of the defendant, which is accordingly done.

On this day, to wit, on the ninth day of August, in the July term, A. D. 1864, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

ROBERT FORSYTH }
vs. } Ejectment.
JAMES BARTON. }

Restitution to Forsyth

This cause coming on again and the court being now sufficiently advised upon the motion of the plaintiff heretofore entered herein by his attorney, for a writ of restitution in this cause, sustains said motion. It is thereupon ordered by the court that the said plaintiff have a writ of restitution, to put him in possession of the following real estate and premises, situate in the county of Peoria and State of Illinois, and described as follows, to wit, claim number twenty-seven in the village of Peoria and State of Illinois, confirmed to the legal representatives of Michael La Croix by the confirmatory act of Congress, approved 3d March, 1823, entitled An act to
31 confirm certain claims to lots in the village of Peoria, in the State of
Illinois, and described as follows, to wit, the lot containing twenty-seven thousand four hundred and forty-nine square feet and seven hundredths of a square foot, surveyed and designated as covered by said claim number twenty-seven, in the southeast fractional quarter of fractional section nine, township eight north, of range eight east of the fourth principal meridian, Illinois, according to the survey approved 1st September, 1840, by the surveyor of the public lands in the State of Illinois and Missouri. And it is further ordered that the plaintiff have and recover of the said defendant his costs and charges in this behalf.

On this day, to wit, the 9th day of August, A. D. 1864, came said defendant, by his attorney, and filed in the said clerk's office his bill of exceptions, in said entitled cause; which said bill of exceptions is in the words and figures following, to wit:

32 ROBERT FORSYTH }
vs. } In ejectment. On motion for a writ of restitution.
JAMES BARTON. }

Be it remembered, that on the trial of the above motion the plaintiff commenced by reading said motion to the court, which is as follows:

ROBERT FORSYTH }
vs. }
JAMES BARTON. }

And now comes said plaintiff and moves the court to set aside the order for a writ of restitution heretofore entered herein in favor of said defendant, and also to set aside and vacate said writ of restitution and all proceedings had thereunder, and to grant to said plaintiff a new writ of possession, for the reason that said writ of restitution was issued upon a misapprehension or misunderstanding on the part of the court of the facts in the case, or upon a misunderstanding and misapprehension of what the court intended to decide.

GRIMSHAW & WILLIAMS, *Att'ys for Pl'tff.*

Endorsed: Filed July 17th, 1863.

WM. H. BRADLEY, *Clerk.*

33 And to sustain said motion on his behalf he read to the court a writ of possession and the return of the marshal thereon, which are as follows, to wit:

UNITED STATES OF AMERICA, *Northern District of Illinois, ss:*

The United States of America to the marshal of the northern district of Illinois, greeting:

Whereas Robert Forsyth, plaintiff, has lately in our circuit court of the United States for the northern district of Illinois, by the judgment of the said court, recovered against James Barton, defendant, the following described real estate and premises situated in the county of Peoria and State of Illinois, and described as follows, to wit, claim number twenty-seven in the village of Peoria and State of Illinois, confirmed to the legal representatives of Michael La Croix by the confirmatory act of Congress, approved 3d of March, 1823, entitled An act to confirm certain claims to lots in the village of Peoria, in the State of Illinois, and described as follows, to wit, the lot containing twenty-seven thousand four hundred and forty-nine square feet and seven hundredths of a square foot, surveyed and designated as covered by the said claim number twenty-seven, in the southeast fractional quarter of fractional section nine, in township eight north, of range eight east of the fourth principal meridian, Illinois, according to the survey approved 1st September, 1840, by the surveyor of the public lands in the State of Illinois and Missouri, which said premises have been and still are unjustly withheld from the said plaintiff by the said defendant, whereof he is convicted, as appears to us of record; and forasmuch as it is adjudged in the said court that the said plaintiff have execution upon his said judgment against the said defendant according to the force, form, and effect of his said recovery: Therefore we command you that without delay you deliver to the said plaintiff possession of the premises so recovered, with the appurtenances, and that you certify hereon to our said court in ninety days from the date hereof in what manner you shall have executed this writ. 34

And we further command you that of the goods and chattels, lands and tenements of the said James Barton, in your district, you cause to be made the sum of one hundred and sixty dollars and twenty-six cents, which the said plaintiff also recovered against said defendant for his costs and charges in that behalf expended, whereof the said defendant is convicted, as appears to us of record, and have you that money ready in ninety days to render to the said plaintiff for his costs and charges aforesaid.

35 Witness the Hon. Roger B. Taney, chief justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 19th day of July, in the year of our Lord one thousand eight hundred and fifty-eight, and of our independence the 83d year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

By virtue of the within writ to me directed I did on this 3d day of September, A. D. 1858, give possession of the within-described property to the within-named Robert Forsyth as commanded.

JAMES W. DAVIDSON, *U. S. Marshal,*
By F. W. SMITH, *Dep't.*

Received of Charles Ballance 105 00 dollars on the within writ, October 1st, 1858. Paid to Robert Forsyth.

JAMES W. DAVIDSON, *U. S. Marshal,*
By F. W. SMITH, *Dep't.*

Endorsed: Filed Oct. 11th, A. D. 1858.

WM. H. BRADLEY, *Clerk.*

He then read the motion of defendant for a writ of restitution, and the papers submitted in support thereof and against the same, as follows:

36 STATE OF ILLINOIS, *Peoria County, ss:*

I, Hugh Armson, being first duly sworn, on oath state that in the year 1858 I went to Peoria to establish a lumber yard, and finding a piece of ground described as lots three, four, nine, and ten, in block forty-nine, vacant, I enquired as to its ownership and was directed to Charles Ballance. I called to see him. He declined giving me a lease, but took me to Henry Grove, who gave me a lease of the ground above described, and I commenced dealing in lumber on it.

The whole of said premises were then vacant and unoccupied, except that on the most northerly corner there was a small frame building used as an office. I never knew James Barton and did not claim under him. After I had been in possession some time a man by the name of Francis W. Smith, who professed to have authority from the United States court for so doing, turned me out and gave the possession of said premises to Robert Forsyth. And further affiant saith not.

HUGH ARMSON.

Subscribed and sworn to before me this 18th day of June, A. D. 1862, at Elmwood, Peoria Co., Illinois.

[L. S.] THOMAS CRATLY, *N. P.*

37 UNITED STATES OF AMERICA:

In the circuit court for the northern district of Illinois.

I, John Comstock, do solemnly swear that I have for many years resided in the city of Peoria, State of Illinois, and my business is that of a land agent and dealer in lands and city lots; that on and previous to the seventeenth day of September, 1857, I claimed to be the owner of the east half of lot three, all of lots four and ten, in block forty-nine, of Bigelow & Underhill's addition to Peoria, Illinois; that on that day, for the consideration of three hundred dollars, I conveyed the same to Henry Grove by a deed of conveyance, a copy of which is hereto appended, marked "A," and made a part hereof; that I did not claim said lots under Robert Forsyth, James Barton, Charles Ballance, or and one else in anywise connected with either of them, but I claimed adversely to them all. Said lot number four had been sold by John A. McCoy, then treasurer of Peoria County, at a public sale of lots at the front door of the court-house, in the city of Peoria, on the eleventh day of June, 1855, to one James Dougherty, for the taxes due the State of Illinois and county of Peoria for the year A. D. 1854, and the certificate of purchase was for a valuable consideration assigned by said Dougherty to me. The said east half of lot three and all of lot ten, in said block forty-nine, were sold to me by said McCoy, at said sale, for the State and county tax of said year 1854; and two years having expired after said sale, and no one 38 having redeemed said lots according to law, Francis W. Smith, sheriff of Peoria County and State of Illinois, on the 27th day of June, A. D. 1857, executed to me a deed for said lots, a copy of which is hereunto appended, marked "B," and made a part hereof. In all this matter I acted in the line of my business, without reference to the interest of any one but myself.

JOHN COMSTOCK.

Sworn to and subscribed before me this 13th day of June, A. D. 1862.

[SEAL.] HENRY M. PECK, *Notary Public.*

EXHIBIT A.

This indenture, made this seventeenth day of September, in the year of our Lord one thousand eight hundred and fifty-seven, between John Comstock and Amelia A., his wife, of the city and county of Peoria and State of Illinois, parties of the first part, and Henry Grove, of same city, county, and State, party of the second part, witnesseth, that the said parties of the first part, for and in consideration of the sum of three hundred dollars, lawful money of the United States of America, to them in hand paid by the said party of the second part at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have remised, released, and forever quit-claimed, and by these presents do remise, release, sell, and forever quit-claim, unto the said party of the second part, and to his heirs and assigns, forever, all those certain lots or parcels of land situate, lying,
39 and being in the city of Peoria, county and State aforesaid, known
and described as follows, to wit: Lot number four in block number forty-nine; also the east half of lot number three in said block number forty-nine, and also lot number ten in said block number forty-nine; all of said lots being in Bigelow & Underhill's addition to the town, now city, of Peoria aforesaid, reference being had to the plat of said addition, of record in the recorder's office of said county. To have and to hold the said premises as above described, with the privileges and appurtenances thereunto belonging, to the party of the second part, his heirs and assigns, forever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

JOHN COMSTOCK. [SEAL.]
AMELIA COMSTOCK. [SEAL.]

Signed, seal, and in presence of—
LEWIS KEYON.

STATE OF ILLINOIS, *Peoria City and County, ss:*

I, Lewis Keyon, a notary public in and for the city of Peoria and State aforesaid, do hereby certify that on this day personally appeared before me John Comstock and Amelia A. Comstock, his wife, whose names appear subscribed to the foregoing deed of conveyance as having executed the same, who are personally known to me to be the real persons who and in whose names the acknowledgment is proposed to be made, and acknowl-
40 edged the execution thereof as their voluntary act and deed, for the
uses and purposes therein expressed. And the said Amelia A. Comstock having been by me made acquainted with the contents of said deed and by me examined separate and apart from her said husband whether she had executed the same and relinquished her dower to the lands and tenements therein mentioned, acknowledged that she had done so voluntarily and freely and without compulsion of her said husband, and does not wish to retract.

Given under my hand and seal of office, at Peoria, this 31st day of May, A. D. 1858.

[L. S.] LEWIS KEYON,
Notary Public in and for the City of Peoria.

Exhibit B.

Know all men by these presents that whereas at the June term, 1855, of the county court of Peoria County, a judgment was obtained in in said court in favor of the State of Illinois against the following described town lots or parcels of land, situated in the city of Peoria, county of Peoria and State aforesaid, viz: Lot number four in block number forty-nine, in Bigelow & Underhill's addition to said city of Peoria, for the sum of ten dollars and fifty-eight cents, being the amount of taxes, interest, and costs assessed upon the said town lot or parcel of land for the year 1854; and whereas on the eleventh day of June, A. D. 1855, John A. McCoy, then treasurer of the county
41 aforesaid, by virtue of a precept issued out of the county court of the county aforesaid, dated the sixth day of June, A. D. 1855, and to the treasurer of said county directed, did expose to public sale, at the door of the court-house, in the county aforesaid, in conformity with all the requisition of the statute in such case made and provided, the lot or parcel of land above described, for the satisfaction of the judgment so rendered as aforesaid; and whereas at the time and place aforesaid James Dougherty, of the city and county of Peoria and State of Illinois, having offered to pay the aforesaid sum of ten dollars and fifty-eight cents for the whole of said lot numbered four in block numbered forty-nine, as aforesaid, being the lot of land above described, (which was the least quantity bid for the said lot of land,) was stricken off to said James Dougherty at that price; and whereas the said James Dougherty did, by his endorsement under his hand, written on the back of the certificate of purchase to him executed by the clerk of the said court of Peoria County for the lot of land so sold as aforesaid, at the time of said sale, said endorsement bearing date the twelfth day of June, A. D. 1855, assign the said certificate of purchase to John Comstock, of the city and county of Peoria and State aforesaid; also at the aforesaid June term, 1855, of the county court of said county, a like judgment was obtained in said court in favor of the State of Illinois against lot ten in block forty-nine, in Bigelow & Underhill's addition to Peoria, in the county of Peoria
42 and State aforesaid, for the sum of ten dollars and fifty-eight cents, being the amount of taxes, interest, and costs assessed upon the said lot of land for the year 1854; and whereas at the aforesaid term of said court a like judgment was obtained in said court in favor of the State of Illinois against the east half of lot three in block number forty-nine, in said Bigelow & Underhill's addition to Peoria, in the county of Peoria and State aforesaid, for the sum of ten dollars and fifty-eight cents, being the amount of taxes, interest, and costs assessed upon the said lot of land for the year 1854; and whereas on the twelfth day of June, 1855, John A. McCoy, then treasurer of the county aforesaid, by virtue of a precept issued out of the county court of the county aforesaid, dated the sixth day of June, A. D. 1855, and to the treasurer of said county directed, did expose to public sale, at the door of the court-house, in the county aforesaid, in conformity with all the requisites of the statute in such case made and provided, the two lots or parcels of land above described, for the satisfaction of the judgment so rendered as aforesaid; and whereas at the time and place aforesaid John Comstock, of the city and county of Peoria and State of Illinois, having offered to pay the aforesaid sums of ten dollars and fifty-eight cents for each of the above-described lots, amounting to twenty-one dollars and sixteen
43 cents for both of said described lots, (which was the least quantity bid for the said lots of land,) they were stricken off to said John Comstock at that price: Now, therefore, I, Francis W. Smith, sheriff of Peoria County, for and in consideration of the sum of thirty-one dollars and seventy-four cents, being the full amount of the consideration for the three lots above described, to the said John A. McCoy, treasurer of said county aforesaid, in

hand paid by the said John Comstock at the time of the aforesaid sales, and by virtue of the statute in such case made and provided, have granted, bargained, and sold, and by these presents do grant, bargain, and sell, unto the said John Comstock, his heirs and assigns, the above-described lots of land, viz: Lot number four in block forty-nine, as assignee of the said James Dougherty, in Bigelow & Underhill's addition to Peoria; also the east half of lot three in block forty-nine, and also lot ten in block number forty-nine, both lots in Bigelow & Underhill's addition to Peoria, county and State aforesaid. To have and to hold unto him, the said John Comstock, his heirs and assigns, forever, subject, however, to all the rights of redemption provided by law.

In witness whereof, I, Francis W. Smith, sheriff as aforesaid, by virtue of the authority aforesaid, have hereunto subscribed my name and affixed my seal this 27th day of June, A. D. 1857.

FRANCIS W. SMITH, [SEAL.]
44 *Sheriff of Peoria County, Illinois.*

STATE OF ILLINOIS, *Peoria County, ss:*

This day personally appeared before me, Charles Kettelle, clerk of the county court within and for said county, Francis W. Smith, personally known to me to be the real person whose name appears subscribed to the foregoing deed of conveyance as having executed the same as sheriff of said county, and acknowledged the execution thereof to be his free act and deed, for the uses and purposes and in the capacity therein set forth. In testimony whereof I have hereunto set my hand and the seal of said court, at Peoria, this 27th day of June, A. D. 1857.

CHARLES KETTELLE, *Clerk.*

"C."

This indenture witnesseth that Henry Grove, party of the first part, in consideration of the admissions, promises, and agreements of Hugh Armson, party of the second part, hereinafter contained, hath demised and leased unto said party of the second part for a term of one year, commencing on the nineteenth day of July, A. D. eighteen hundred and fifty-eight, and expiring at noon on the nineteenth day of July, A. D. eighteen hundred and fifty-nine, lots three, four, nine, and ten, in block forty-nine, of Bigelow & Underhill's addition to Peoria, being the same ground formerly occupied by Alexander Hawthorn, and still more lately by one Jourdan 45 as a lumber yard, together with the office and other appurtenances thereunto belonging, excepting a pair of Fairbanks's large platform scales, which may be removed. Said party of the second part hereby acknowledges that he has received from said party of the first part possession of the premises aforesaid in good tenantable condition and repair, and agrees to preserve and leave the same in like condition and repair (ordinary wear excepted) at the end of said term, and personally occupy, appropriate, and use said premises during said term, exclusively for the usual purposes of a lumber yard and to buy and ship grain, and also pay said party of the first part two hundred and forty dollars as rent therefor for the term aforesaid, payable monthly payments of twenty dollars at the end of each and every month during said term.

And unless said party of the first part shall expressly otherwise agree in writing, he may elect to and recover possession of said premises at any time after said term expires or after said party of the second part fail to pay at the time due any rent or other money to become payable hereon, or fail to fulfill any stipulation hereof; and said party of the first part may also elect to recover possession of said premises in case waste or alteration is

committed or suffered as aforesaid, to or upon any part thereof, and whether he shall so elect or not in either of the cases aforesaid said party of
46 the second part agree to pay said party of the first part the increased rent aforesaid, for and during the times provided aforesaid for the payment of the same, he hereby expressly waiving any other or further notice than is herein expressed or implied, of the end or sooner determination of the term hereof, in any of the ways herein provided; also hereby expressly waiving any demand being made (either verbal or written) for the possession of said premises whenever the term hereof shall so become determined. And said party of the first part may distrain for any rent or other money that may remain unpaid hereon after the same becomes due upon any property belonging to said party of the second part, whether the same be exempt from execution and distress by law or not, said part of the second part hereby expressly waiving all legal rights which he may now or hereafter have, to hold or retain any such property under and by virtue of "an act to exempt homesteads from sale or execution," which act took effect July 4th, A. D. 1851, and under and by virtue of any other exemption laws now or hereafter to become in force in this State, or in any other way.

Said party of the second part hereby further agree that he will provide and pay to said party of the first part a sufficient amount of funds for him to pay any and all taxes, assessments, and impositions (both ordinary and extraordinary) which may hereafter be ordered, levied, imposed, or
47 assessed against or upon said demised premises or any part thereof, immediately after the amount to be paid for any of such purposes can be ascertained during the whole of said term, and so long thereafter as said party of the second part continue to occupy said premises.

Said parties hereby further agree that all of his admissions, promises, and agreements herein contained shall extend to and bind his heirs, executors, and administrators and assigns.

Executed at Peoria this nineteenth day of July, A. D. 1858.

[SEAL.] HENRY GROVE,
Per L. R. WEBB.
[SEAL.] HUGH ARMSON.

Exhibit C identified in Mr. Webb's deposition.

I, Lysander R. Webb, do solmenly swear that I was well acquainted with lots three, four, nine, and ten, in block forty-nine, of Bigelow & Underhill's addition to Peoria, Illinois, in July, 1858, and before and since that time. I know that previous to the lease hereinafter spoken of to Hugh Armson, said lots were vacant and unoccupied, with the exception of a small office situated on lot three, which, on the 19th day of July, 1858, and for some time previously, was unoccupied. Charles Ballance had previous to July, 1858, claimed said lots and had tenants on them, but before that time he had abandoned them. About the middle of that month one Hugh
48 Armson came to Peoria, and desired a place to pile and sell lumber, and applied to Charles Ballance in my presence for a lease of said lots for that purpose. Said Ballance refused to make him any lease therefor, alleging that Robert Forsyth claimed the said lots and had a judgment in ejectment for them, or a portion of them. He also stated that they were claimed by Henry Grove under a tax title, and that he (Ballance) did not wish to assume any responsibilities about it. Being anxious to obtain said ground for said Armson, I went with him to see said Grove, to whom he was a stranger, and with said Grove's consent executed in his name to said Armson a lease for said lots, a copy of which is hereto annexed, marked "C." Said Armson went into the possession of said lots under said lease, using

them for the lumber trade, and so remained for about three months, when he was turned out by virtue of a writ of possession, as I understood, in the case of Robert Forsyth *vs.* James Barton.

LYSANDER R. WEBB.

Sworn to and subscribed before me this 13th day of June, 1862.
[SEAL.] HENRY M. PECK.

I, Charles Ballance, being first duly sworn depose and say that I am well acquainted with lot twenty-seven of the French village of Peoria, and lots three, four, nine, and ten, in block forty-nine, of Bigelow & Un-
49 derhill's addition to Peoria. Previous to the judgment of the United States court for the northern district of Illinois in favor of Robert Forsyth against James Barton for a portion of said property, I claimed to be the owner, and supposed I was in law and equity the owner, of said lots three, four, nine, and ten; and during the progress of said suit I petitioned said court to be permitted to come in and defend said suit as a sole or joint defendant, but the plaintiff, by his counsel, objected to let me in to defend either as sole or joint defendant, and said court refused to let me become a party defendant without the consent of said plaintiff. After such a decision had been made in the United States Supreme Court as entitled said Forsyth to a writ of possession as against said Barton, said premises were entirely abandoned and became vacant, except a small office, standing in the extreme north corner of said lot three. While said property was vacant and abandoned as aforesaid one Hugh Armson applied to me to rent the same for a lumber yard. I refused to rent it to him, and gave as a reason that Robert Forsyth and Henry Grove both claimed the ground, and that Forsyth could, if he would, obtain a writ of possession on a judgment he had against it, and I did not desire any trouble about it. On or about the third day of September Francis W. Smith, who professed to act as a dep-
50 uty of James W. Davidson, marshal of the northern district of Illinois, turned out said Armson and gave the possession of said premises to Robert Forsyth. A copy of a plat of said premises, which is on file in said cause of Forsyth *vs.* Barton, and which both parties in said cause admitted to be correct, is hereto attached, marked Exhibit D, and prayed to be made a part hereof. According to said plat, and according to the survey as I understood it to be at the time of trial, (and I know of no one who understood it differently,) said office was not all, if any of it, on the ground litigated in said suit, but was on a portion of said lot three, outside of said lot twenty-seven. According to a lease between Henry Grove and said Armson, the latter had taken possession of said office and was occupying it on said third day of September; but said Smith turned him out of this office also, and gave it to said Forsyth. It is true that on that day said Forsyth got a surveyor to make a survey of said lot, who run the northeast line of said lot twenty-seven further to the northeast than it had always been understood to be, so as to cut off a part of said office, but still leaving that portion of said office occupied by the desk and books and the greatest portion of the door into said office on ground not covered by French claim No. 27; yet from the whole of said office said Armson was ejected by said deputy
51 marshal, and said Forsyth put into possession. Said house belonged to me. I had bought it and paid for it, yet said Forsyth has had tenants in it from that day to this, not as a part or appurtenance to the lumber yard, but as a separate tenement. Soon after these transactions took place I, in the name of said Armson, but as the attorney of said Grove, gave notice that at the next term of this court I would move the court to set aside all proceedings under said writ of possession, and reinstate said Armson in the

possession of said premises. This notice was served on one of the attornies of said Robert Forsyth, as I now recollect, on N. H. Purple, esq. At the next term of this court held after the execution of said writ (as I now remember, in December, 1858) I made said motion and filed some papers to sustain it. I cannot now say what those papers were, but I presume a paper setting forth the reasons for it and affidavits to sustain it. When said motion was called up by me, Mr. Cassin, then an attorney of this court, appeared for said Forsyth, and stated that his partner, Mr. Beckwith, had been requested by said Purple, as I now recollect, to appear to the motion, and ask time to file counter affidavits, and as Mr. Beckwith was absent from the city, he asked and obtained a continuance of the motion to file counter affidavits. Whether said counter affidavits were ever filed I do not
52 know; but if they were they are lost, with all the papers in the motion. The clerk of this court has assured me that he has made diligent search, and repeated search, in his office, but can find none of said papers. [Since found.]

I notified John T. Lindsay, one of said Forsyth's attorneys in Peoria, and who has the defense of two other suits growing out of this transaction in Peoria, that on last Wednesday, or as soon thereafter as counsel can be heard, I would bring up this motion to be heard. Said Armson never had any interest in this matter only as a tenant, and has long since left Peoria.

I have on several occasions tried to get this motion docketed, that it might be brought on for trial in its order, but up to this time I cannot find from the records or dockets of the court that any entry has been made respecting it.

And further affiant saith not.

C. BALLANCE.

Sworn to and subscribed before me this 13th day of June, A. D. 1862.
WM. H. BRADLEY, *Clerk.*

EXHIBIT F.

Hon. A. L. Merriman, Hon. N. H. Purple, and Hon. John T. Lindsay:

GENTLEMEN: You are hereby notified that on Friday morning, the 10th inst., or as soon thereafter as counsel can be heard, I shall (in open court) move the circuit court of the United States for the northern district of Illinois, now in session at Chicago, for writs of restitution in the cases
53 of Robert Forsyth *vs.* James Barton, Robert Forsyth *vs.* Thomas Meehan and Charles Ballance, Robert Forsyth *vs.* Richard Gregg and Charles Ballance, Wm. P. Bryant *vs.* Richard Gregg, and Edward P. Tesson, *vs.* Richard Gregg.

Yours, in haste, C. BALLANCE, *for said Defendants.*
Peoria, October 8, 1862.

54 [Here follows map, page 54.]

Plat showing how lot 27 of Brown's survey interferes with lots 3, 4, 9, and 10, in block 49, of Bigelow & Underhill's survey. The broken lines are those of the former and all others are those of the latter. This is the plat referred to in witness Ballance's deposition.

55 I, Henry Grove, do solemnly swear that I have examined the foregoing affidavits of Lysander R. Webb, John Comstock, and Hugh Armson, and believe them to be true; so far as the facts come within my knowledge they are true. I did claim said premises under said deed from John Comstock as said Comstock has described, and did lease them to Hugh

Armson, as is set forth said Webb's affidavit. I did not claim said premises under James Barton nor Robert Forsyth. I never had any dealings with James Barton, and do not know that I ever saw him.

H. GROVE.

Subscribed and sworn to before me this 8th day of Oct., 1862.
[SEAL.] EUGENE McCUNE, *Notary Public.*

Endorsed: Filed Oct. 13, 1862.

WM. H. BRADLEY, *Cl'k.*

56 And the affidavit of plaintiff, filed Nov. 4, 1862, and affidavit of John T. Lindsay, filed Nov. 8, 1862, which are as follows, to wit:

United States circuit court, October term, A. D. 1862.

Robert Forsyth
vs. } Ejectment.
James Barton.

Robert Forsyth, being sworn, says that he is the plaintiff in this suit; that immediately after the writ of possession was served on Hugh Armson the said Armson voluntarily leased the premises described in the writ from this deponent, and occupied the same under him for some time; that Hancock & McCulloch afterwards entered and occupied the premises under this deponent, and still holds such possession; that immediately after said Hancock & McCulloch went into possession actions of ejectment and forcible entry and detainer were commenced against the said Hancock & McCulloch, in the county of Peoria, and are both now pending and undetermined in the circuit court of Peoria County. And this deponent further states, on his information and belief, that Charles Ballance, who was the landlord of the defendant, James Barton, is the real owner of the title or claim of title vested in Henry Grove, as set forth in the affidavits filed in support of the motion 57 herein, and that the motion is now made for the benefit of said Charles Ballance. And this deponent states that the said Grove has not, in person or otherwise, except through the said Charles Ballance or his agents, interfered with said property or in regard to the title claimed to be vested in him; that L. R. Webb, who introduced Armson to Grove and signed Grove's name to the lease filed, is a son-in-law and agent of Ballance; that the suits now pending in Peoria County were commenced in the name of Grove by Ballance as an attorney; that the said Grove is a competent and able attorney-at-law, engaged in full practice in Peoria County, and usually attends to his own business. And this deponent states that at a certain time since the commencement of the suits aforesaid in Peoria County, when depositions were about to be taken in one of said cases, this deponent heard said Grove say to Charles Ballance, referring to said suits, "they are your concerns; do as you please with them."

ROBERT FORSYTH.

Subscribed and sworn to before me this 4th day of November, 1862.
WM. H. BRADLEY, *Cl'k.*

Endorsed: Filed Nov. 4th, 1862.

WM. H. BRADLEY, *Cl'k.*

58 Robert Forsyth
vs. }
James Barton.

John T. Lindsay, being first duly sworn, deposes and says that in the action of forcible entry and detainer of Hugh Armson *vs.* Robert Forsythe for

the possession of claim number twenty-seven—French claims—in village of Peoria, Peoria County, State of Illinois, he, in connection with Henry Lander, appeared in said cause as attorneys for the said Robert Forsythe, and that Charles Ballance appeared in said cause as the person interested as plaintiff, and that Henry Grove stated at the trial of said cause that he represented Ballance, and that he appeared in said cause to accomodate Charles Ballance; and when said case was appealed into the circuit court of Peoria County said cause was managed by Charles Ballance; the said Grove would sometimes appear for Ballance in his absence, always stating to the court that the case was Ballance's case, and he would never take any steps in the case without, as he said, seeing Mr. Ballance first, as he only appeared in the case to accomodate his old friend Charles Ballance; and that
59 whenever any continuance was made in said case, or any action done of any importance, Ballance made all agreements and done all things in such case without consulting Mr. Grove or any other person. The property for which said forcible entry and detainer was commenced by Armson to obtain possession was the same that Forsyth obtained possession by virtue of a writ of possession from the United States court in case of Robert Forsythe *vs.* James Barton, and the same property that the said Hugh Armson took a lease from Robert Forsythe after the said Forsythe had been put in possession by the marshal under and by virtue of said writ from the said court, and that said lease was secured by said Armson before the commencement of the suit of forcible entry and detainer; and that said lease, to the best of my knowledge, is now in the possession of C. Beckwith, esq., of Chicago.

JOHN T. LINDSAY.

Subscribed and sworn to before me this 7th day of November, A. D. 1862.
[SEAL.] LESLIE ROBINSON, *Notary Public.*

Endorsed: Filed Nov. 8th, 1862.

WM. H. BRADLEY, *Cl'k.*

60 Which said papers were all the evidence submitted to the court when the writ of restitution was allowed.

The plaintiff then introduced said Henry Grove and Charles Ballance, and cross-examined them. On said cross-examination said Henry Grove testified as follows:

Henry Grove sworn March 30, 1864, in court.

Both parties, by counsel, present.

Know where the land is, described in deed from John Comstock to me.

Lease of witness to Hugh Armson shown.

The only title I ever had was by virtue of deed of Comstock to me. Mr. Webb, son-in-law of Mr. Ballance, told me that Comstock had the title to certain premises on Water st. for $300, and money could be made. I wanted him to go shares. He assented, and I told him to buy it. He negotiated with Comstock, so far as I know; got the deed; sent it to me—now produced—and, in pursuance of our understanding he executed the lease now shown. I conveyed the land to Webb. I never paid anything. Shortly after I heard Armson was disturbed by Forsyth or some one else. I told Webb he might take it and do the best he could, and if there was anything he might account. I never got any rent; never paid any taxes. I
61 had no knowledge that Webb was acting for Ballance. I understood that Webb bo't it for himself and me. Whether Webb paid for it in money or in any other way I do not know.

Cross-examined.

Lease contains property not in deed. No one in possession when we went to look on the land. Have no recollection of any lumber yard. A little building on the land on one corner. Armson took possession under the lease, I understood. He took it for a lumber yard. Have no distinct recollection as to the time of Armson's possession. The whole details of the business were done by Mr. Webb. I told him I couldn't attend to it myself.

And said Charles Ballance, on said cross-examination, testified as follows:

Mr. Webb, my son-in-law, has collection of my rents. I told him if he could get the tax title there could be some money made on it. Know that $300 were paid. He may have used my money or not. I think I sent
62 Armson to Webb or Grove. Mr. Grove released all claim to me since Webb's death by a deed, which is as follows:

63 This indenture, made this second day of July, in the year of our Lord one thousand eight hundred and sixty-three, between Henry Grove and Clara B. Grove, his wife, of the first part, and Charles Ballance, of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of one dollar, lawful money of the United States of America, to them in hand paid by the said party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have remised, released, sold, and forever quit-claimed, and by these presents do remise, release, and forever quit-claim, unto the said party of the second part, and to his heirs and assigns, forever, all that certain tract of land known and described as lots three, four, nine, and ten, of block forty-nine, in Bigelow & Underhill's addition to Peoria.

[I believe that I have heretofore executed a deed for the above premises either to Mr. Webb or to Mr. Ballance; and if so, Ballance takes this conveyance subject to said former deed.]

To have and to hold said premises as above described, with the
64 privileges and appurtenances thereunto belonging, to the party of the second part, his heirs and assigns, forever.

In witness whereof, said parties of the first part have hereunto set their hands and seals the day and year first above written.

H. GROVE. [SEAL.]
C. B. GROVE. [SEAL.]

Signed, sealed, and delivered in presence of.

STATE OF ILLINOIS, *Peoria City and County, ss:*

I, Leslie Robinson, a notary public for the city of Peoria, Illinois, do certify that on this day personally appeared before me Henry Grove and Clara B. Grove, whose names appear subscribed to the foregoing deed of conveyance as having executed the same, who are personally known to me to be the real persons who and in whose names the acknowledgment is proposed to be made, and acknowledged the execution thereof as their voluntary act and deed, for the uses and purposes therein expressed; and Clara B. Grove, wife of said Henry Grove, having been by me made acquainted with
65 the contents of said deed, and by me examined separate and apart from her said husband, whether she had executed the same and relinquished her dower to said lands and tenements therein mentioned, acknowledged that she had done so voluntarily and freely and without compulsion of her said husband, and doth not wish to retract.

Given under my hand and seal of office, at Peoria, this 3d day of July, A. D. 1863.

[SEAL.] LESLIE ROBINSON, *Notary Public.*

STATE OF ILLINOIS, *Peoria County:*

RECORDER'S OFFICE.

I, Enoch P. Sloan, clerk of the circuit court in and for the county of Peoria and State of Illinois and ex officio recorder of deeds in said county, do hereby certify that the annexed deed was filed for record in my office on the 6th day of July, 1863, and has been duly recorded, with the accompanying certificate, on page 261, in Book L B, in said recorder's office.

In witness whereof, I have hereunto affixed the seal of the said circuit court, at my office, in Peoria, this 6th day of July, 1863.

[SEAL.] ENOCH P. SLOAN, *Clerk and Recorder.*

66 The plaintiff then read the following writ of restitution and return, which is as follows, to wit:

UNITED STATES OF AMERICA, *Northern District of Illinois, ss:*

The United States of America to the marshal of the northern district of Illinois, greeting:

Whereas James Barton, defendant, has lately, in our circuit court of the United States for the northern district of Illinois, by the judgment of the said court, obtained an order for a writ of restitution against Robert Forsyth, plaintiff, for the possession of the following described real estate and premises, situated in the county of Peoria and State of Illinois, and described as follows, to wit: Claim number twenty-seven in the village of Peoria and State of Illinois, confirmed to the legal representatives of Michael La Croix by the confirmatory act of Congress, approved 3d March, 1823, entitled An act to confirm certain claims to lots in the village of Peoria, in the State of Illinois, and described as follows, to wit, the lot containing twenty-seven
thousand four hundred and forty-nine square feet and seven
67 hundredths of a square foot, surveyed and designated as covered by said
claim number twenty-seven, in the southeast fractional quarter of fractional section nine, in township eight north, of range eight east of the fourth principal meridian, Illinois, according to the survey approved 1st September, 1840, by the surveyor of the public lands in the States of Illinois and Missouri, the possession of which said premises it is alleged was wrongfully obtained from the said defendant and still are unjustly withheld from the said James Barton, defendant, by the said Robert Forsyth, plaintiff, whereof he is convicted, as appears to us of record; and forasmuch as it is adjudged in the said court that the said defendant have execution upon his said order against the said plaintiff according to the force, form, and effect of his said recovery: Therefore we command you that without delay you restore to the said defendant, James Barton, possession of the said premises, with the appurtenances, and that you certify hereon to our said court in ninety days from the date hereof in what manner you shall have executed this writ. And
we further command you that of the goods and chattels, lands and
68 tenements of the said Robert Forsyth, plaintiff, you cause to be made
the sum of five dollars and eighty cents, which the said defendant also recovered against said plaintiff for his costs and charges in that behalf expended, whereof the said plaintiff is convicted, as appears to me of record, and have you that money ready in ninety days to render to the said defendant for his costs and charges aforesaid.

Witness the Hon. Roger B. Taney, chief justice of the Supreme Court of the United States of America, at Chicago aforesaid, this twenty-seventh day of May, in the year of our Lord one thousand eight hundred and sixty-three, and of our independence the eighty-seventh year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

Received of J. R. Jones, U. S. marshal, the possession of lots three, four, nine, and ten, in block 49, in Bigelow & Underhill's addition to the city of Peoria, Illinois, that being the amount owned by plaintiff of French claim No. 27, as described in plaintiff's declaration in this cause.

June 3rd, 1863.

LESTER ROBISON,
Attorney in fact for Plaintiff.

Executed this writ by delivering the possession of the within-de-
69 scribed real estate to James Barton's attorney, as per his receipt above,
this 3rd day of June, A. D. 1863.

Fi. fa. satisfied in full, I having received of Robert Forsyth seventeen dollars and twenty cents in full satisfaction, (cost of court and marshal fees on same,) this 13th day of June, 1863.

J. R. JONES, *U. S. Marshal, N. District Ill's,*
By P. MUNSON, *Deputy.*

Rec'd on the within writ June 16, 1863, of J. R. Jones, U. S. marshal, five dollars and eighty cents.

WM. H. BRADLEY.

Endorsed: Filed June 16th, A. D. 1863.

WM. H. BRADLEY, *Clerk.*

70 Whereupon and after argument of counsel, and the court being sufficiently advised in the premises, sustained said motion and quashed said writ of restitution that had been issued in behalf of said defendant, and granted a writ of restitution to put out the present tenant and reinstate the said Forsyth in the possession of said premises; to all of which decisions and rulings of said court said defendant, by his counsel, then and there at the time of entering said decisions and rulings excepted, and prayed that this his bill of exceptions might be sealed, signed, and made of record; which was accordingly, &c.

THOMAS DRUMMOMD. [SEAL.]

Endorsed: Filed Aug. 9, 1864.

WM. H. BRADLEY, *Clerk.*

71 On this day, to wit, the 19th day of August, A. D. 1864, came said defendant, by his attorney, and filed in said clerk's office his appeal bond in said entitled cause; which said bond is in the words and figures following, to wit:

United States circuit court, northern district of Illinois, July term, 1864.

ROBERT FORSYTH
vs. } In ejectment.
JAMES BARTON.

Know all men by these presents that I, the undersigned, Charles Ballance, of Peoria, am held and firmly bound unto Robert Forsyth, of St. Louis County, Mo., in the penal sum of one thousand dollars, lawful money of the United States, for the payment whereof, well and truly to be made, I bind myself, my heirs, executors, and administrators, jointly, severally, and firmly by these presents.

The condition of the above obligation is such that whereas the above-named plaintiff did at the present term of said court recover a judgment
againt said defendant, on a certain motion made by said plaintiff to
72 set aside a certain writ of *of* possession that before that time had been
granted to said defendant, together with all the proceedings that had

been had under the same, and to grant a writ of re-restitution to said plaintiff for said premises, which are fully described in said motion, declaration, and judgment in the case, and said defendant has this day sued out a writ of error to the Supreme Court of the United States to obtain the reversal of said judgment: Now, therefore, if the said defendant shall prosecute said writ of error with effect and without delay, and answer all damages and costs if it shall fail to make good its plea, then the above obligation to be null and void; but otherwise, to remain in full force and virtue.

Witness my hand and seal this 19th day of August, 1864.

C. BALLANCE. [SEAL.]

Approved.

THOMAS DRUMMOND.

Endorsed: Filed August 19th, 1864.

WM. H. BRADLEY, *Clerk.*

73 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States within and for said northern district of Illinois, do hereby certify the foregoing transcript, from pages one to seventy-two, inclusive, to be a true and correct copy of the original pleadings and record, together with all the affidavits, testimony, and exhibits taken and filed therein on the motion of the defendant, James Barton, for a writ of re-restitution of the real estate and premises therein described, being all of the record called for in the bill of exceptions taken by said plaintiff in error, James Barton, in the suit of Robert Forsyth against the said James Barton, as the same now remain in my custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court, at my office, in Chicago, in said northern district of Illinois, this seventh day of December, A. D. 1864.

WILLIAM H. BRADLEY, *Clerk.*

74 UNITED STATES OF AMERICA, *Northern District of Illinois, ss:*

To the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a certain judgment, on a certain motion made by the plaintiff to set aside a certain writ of restitution which had been issued out of said court in favor of the defendant, and all proceedings that had been had thereunder, and to grant a writ of re-restitution to said plaintiff, which case is in said court before you between Robert Forsyth, plaintiff, and James Barton, defendant, a manifest error hath happened, to the great damage of said Barton, as by his complaint appears, and it being fit that that error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf: You are therefore commanded, if judgment be therein given, that you then, under your seal, distinctly and clearly, send the record and proceedings aforesaid, with all things concerning the same,
75 to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to law and the custom of the United States should be done.

Witness the Honorable Roger B. Taney, chief justice of the Supreme Court of the United States, this 19th day of August, A. D. 1864, and of our independence the 89th year.

WILLIAM H. BRADLEY, *Clerk.*

76 United States of America, ss:

To Robert Forsyth, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein James Barton is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Thomas Drummond, one of the justices of said court, this ninth day of August, 1864.

THOMAS DRUMMOND.

I acknowledge service of the within citation this ninth day of August, 1864.

W. C. GOUDY, *Att. for Robert Forsyth.*

Filed December 10, 1864.

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○

Supreme Court of the United States.

DECEMBER TERM, 1866. No. 134.

JAMES BARTON
vs. } *In Error to the Northern District of Illinois.*
ROBERT FORSYTH.

This was an action of ejectment, brought more than sixteen years ago, by Forsyth against Barton, a transient person, who happened to be in possession. Forsyth had no title, and hardly a pretense of one. I have no idea that his Attorney expected anything more than to get something by way of compromise, as he did in many other groundless cases in that neighborhood. But no compromise being effected, a trial was had, and Judge Drummond, who has to this day escaped the charge of being partial to the side of these cases I represent, decided that the Plaintiff had no title whatever, and gave judgment against him, and I thought that was the end of it; but subsequently, within a year, but without my knowledge, he paid the cost, docketed the case, as by our ejectment law he had a right to do, and called it up, or it was called up for trial. Mr. Lincoln, who was since President of the United States, was present and remonstrated with the Court and Forsyth's Attorneys against trying the case in my absence, and without my knowledge, and said I was expected there the next day; but the Judge ruled the case to trial, whereupon Mr. Lincoln told them he knew nothing of the case, and had not my title papers, but if they ruled him into trial in that manner, he would sit by and watch them, and take any advantage of them he could. After they had proceeded in the trial some length, they asked him to admit possession of the premises at the commencement of the suit, which I had, to save cost, done on the former trial, (proof of possession being in those days necessary,) but this he declined to do, and they would have been driven to a nonsuit had not Mr. Lincoln, out of abundant good nature, consented to a continuance.

Afterwards the case was tried before Judge McLean and Judge Drummond. The latter decided the law as he had done before, but Judge McLean was of a different opinion, and when those Judges sat together, they reversed the common law maxim, that "the plaintiff cannot rely upon the weakness of the defendant's title, but he must rely upon the strength and goodness of his own." If they differed in opinion, they gave the plaintiff the benefit of that difference. If one thought the plaintiff ought to recover and the other thought he ought not, they gave him the land. They so decided in this case, and in the case of

Gregg vs. Bryant, that was afterward reversed by this Court. I sued out a writ of error, but this Court sustained the decision below, without looking into the merits, upon the ground of insufficiency of the bill of exceptions. (Barton vs. Forsyth, 20 How. 532.)

To that decision I submitted, and abandoned the premises, that Forsyth might take possession, but he did not do it. After they had been vacated for some time, a man by the name of Armson applied to me to rent the premises for a lumber yard. I told him I could not rent them; that Forsyth had a judgment for those premises, as against Barton and me, as his landlord, and should I rent them to him, Forsyth would probably get a writ of possession and turn him out. But that while Forsyth and I were at law about it, both neglected to pay the taxes, and John Comstock had obtained a tax title on them, and that I believed Henry Grove had bought that title from Comstock, and it was possible he might get possession from him. Upon this suggestion he rented the ground from Grove, according to his claim, which was described as lots three and four, nine and ten, of block forty-nine, including not only that portion of French claim No. 27, which is in dispute, but considerably more ground, which sufficiently appears by the accompanying plat; and thereupon he took possession and made a lumber-yard of said ground. Forsyth sued out a writ of possession, and on the 27th of June, 1857, turned him out, not only of the ground Forsyth claimed, and which is specially described in the judgment and writ of possession, but of some ground he never claimed, and which was no part of lot 27.

I moved for a writ of restitution upon the ground that Armson, who was dispossessed, was not in under Barton, nor any one connected with Barton's title. This motion was postponed from year to year, without any cause that I ever could learn, except that at one time the papers were lost, until May 15, 1863, when the Court ordered a writ of restitution, which was executed on the 3d day of June, 1863. On the 17th of July, 1863, Forsyth's Attorneys made a motion "to set aside the order for a writ of restitution," and "said writ of restitution;" and, finally, on the 9th July, 1864, the Court actually re-tried said motion, permitting Forsyth's Attorneys to bring in new evidence; and upon this second trial reversed the former decision, granting a writ of restitution, and actually issued another writ of possession, upon which the premises were restored to Forsyth, not only what he claimed, but a portion he did not claim.

Upon this state of the record, four questions arise:

1st. Whether, the term having passed, the Court could call up the case and re-try it, or whether it had not passed from its jurisdiction and become a fit question for the Supreme Court on a writ of error?

2d. When the second trial turned upon a concatenation of facts, to establish and rebut the existence of a privity between Grove, Webb, Armson and Ballance, was the Court competent to unravel the facts and decide the question, or was not a jury requisite?

3d. Whether the writ of possession could clear the premises of all persons found there, without regard to their titles, or whether it would only remove the Defendant and those claiming in privity with him?

4th. Whether, the judgment and writ being specific as to the ground to be delivered, the Marshal could go beyond it and give possession of any other ground?

With regard to the first point, I would suggest, that although the proceedings are in the form of a new motion, it is in fact a re-trial of the old motion, in which the same evidence was used, and none other, except that two of the same witnesses were cross-examined.

To sustain the first position, I quote the case of Tribble vs. Frame, 3 Mon., 51, which was exactly like the present case, except that the Circuit Court *refused* to quash the writ of restitution, and from the order refusing to quash it, Plaintiff appealed. The Court said: "the adjudication of the Circuit Court quashing the *habere facias possessionum*, and awarding the writ of restitution, was final in its nature, and, having been rendered at a former term of the Court, it ceased to have any power over the judgment, and, if erroneous, the proper remedy was not by motion to that Court but by writ of error to this." If this is not the law, and the Court is permitted, at a subsequent term, to overhaul its decisions, why may they not do it twenty years afterwards, and keep the titles of the country forever in uncertainty?

Upon the second point, that these questions of fact should be passed upon by the jury and not the Court, I refer to the case of Kercheval et al. vs. Ambler, 7 J. J. Marsh., 626, which is below quoted for another purpose; also the case of Fortune vs. Johnson, 318 Styles' Rep. That case seems to have been much like this, though the report is very meagre. As soon as the Chief Justice saw that the one who had gotten into possession claimed an adverse title, he said: "Here is title against title, therefore take your course in law, for we will make no rule in it."

With regard to the third point, the authorities are abundant that a writ of possession reaches nobody, *prima facia*, but the defendant, named in the declaration; yet, if the plaintiff will assume the responsibility of proving that the person he finds in is in privity with the defendant, he may indemnify the sheriff, and the sheriff will turn him out, still leaving the plaintiff liable to a writ of restitution, if it should turn out that no privity existed; but in this case the proof happens to be clear that no privity did exist.

That when Armson was dispossessed by the Deputy Marshal, on the third day of September, 1858, he held under a different title from that Barton held under, is as clearly proved as human testimony can prove anything.

Hugh Armson (page 12) testifies: "That, in the year 1858, I went to Peoria to establish a lumber yard, and finding a piece of ground, described as lots 3, 4, 9, and 10, in block forty-nine, vacant, I inquired as to the ownership, and was directed to Charles Ballance. I called on him. He declined giving me a lease, but took me to Henry Grove, who gave me a lease of the ground above described, and I commenced dealing in lumber on it. The whole of said premises were then vacant and unoccupied, except that on the northwesterly corner there was a small frame building, used as an office. I never knew James Barton, and did not claim under him. After I had been in possession some time, a man by the name of Francis W. Smith, who professed to have authority from the United States Court for so doing, turned me out and gave the possession of said premises to Robert Forsyth."

The Court will see, from Mr. Webb's testimony, that Mr. Armson was mistaken in saying I went with him to Grove. Webb went himself.

Col. Webb said, (page 16:) "I am well acquainted with lots 3, 4, 9, and 10, of block forty-nine, of Bigelow & Underhill's addition to Peoria, Illinois. and was so acquainted in July, 1858, and before and since that time. I know that previous to the lease hereinafter spoken of to Hugh Armson said lots were vacant and unoccupied, with the exception of a small office situated on lot three, which, on the 19th day of July, 1858, and for some time previously, was unoccupied. Charles Ballance had previously to July, 1858, claimed said lots, and had tenants on them, but before that time he had abandoned them. About the middle of that month, one Hugh Armson came to Peoria and desired a place to pile and sell lumber, and applied to Charles Ballance, in my presence, for a lease of said lots for that purpose. Said Ballance refused to make him any lease therefor, alleging that Robert Forsyth claimed the said lots, and had a judgment in ejectment for them, or a portion of them. He also stated that they were claimed by Henry Grove under a tax title, and that he (Ballance) did not wish to assume any responsibilities about it. Being anxious to obtain said ground for said Armson, I went with him to see said Grove, to whom he was a stranger, and, with said Grove's consent, I executed, in his name, to said Armson a lease for said lots, a copy of which is hereto annexed, marked (C.) Said Armson went into possession of said lots under said lease, using them for the lumber trade, and so remained for about three months, when he was turned out by virtue of a Writ of Possession, as I understood, in the case of Robert Forsyth vs. James Barton."

I, being called upon as a witness in the case, stated, (page 17:) "I am well acquainted with lot 27 of the French village of Peoria, and lots 3, 4, 9 and 10 in block 49 of Bigelow & Underhill's addition to Peoria. Previous to the judgment of the United States Court, for the Northern District of Illinois, in favor of Robert Forsyth against James Barton for a portion of said property, I claimed to be the owner, and supposed I was, in law and equity, the owner of said lots 3, 4, 9 and 10; and during the progress of said suit I petitioned said Court to be permitted to come in and defend said suit as a sole or joint defendant, but the Plaintiff, by his Counsel, objected to let me in to defend either as sole or joint defendant, and said Court refused to let me become a party defendant without the consent of said Plaintiff. After such a decision had been made in the United States Supreme Court, as entitled said Forsyth to a writ of possession, as against said Barton, said premises were entirely abandoned, and became vacant, except a small office standing on the northerly corner of siad lot 3. While said property was vacant and abandoned, as aforesaid, one Hugh Armson applied to me to rent the same as a lumber yard. I refused to rent it to him, and gave as a reason that Robert Forsyth and Henry Grove both claimed the ground, and that Forsyth could if he would obtain a writ of possession on a judgment he had against it, and I did not desire any trouble about it.

On or about the third day of September, Francis W. Smith, who professed to act as a deputy of James W. Davidson, Marshal of the Northern District of Illinois, turned out said Armson, and gave the possession of said premises to Robert Forsyth. A copy of a plat of said premises, which is on file in said cause of Forsyth vs. Barton, and which both parties in said cause admitted to be correct, is hereto attached, marked Exhibit D, and prayed to be made a part hereof. According to said plat and according to the survey, as I understood it to be. at the time of said trial, (and I know of no one who understood it differently,) said office was not all, if any of it, on the ground litigated in said suit, but was a portion of said lot 3, outside of said lot 27. According to a lease between Henry Grove and said Armson, the latter had taken possession of said office and was occupying it on said third day of September, but said Smith turned him out of this office also, and gave it to said Forsyth. It is true that on that day said Forsyth got a surveyor to make a survey of said lot, who run the Northeast line of said lot 27 further to the Northeast than it had always been understood to be, so as to cut off a part of said office, but still leaving that portion of said office occupied by the desk and books, and the greater portion of the door into said office, on ground not covered by French claim No. [illegible]7; yet, from the whole of said office, said Armson was ejected by said Deputy Marshal, and said Forsyth put into possession. Said house belonged to me. I had bought it and paid for it; yet said Forsyth has had tenants in it from that day to this, not as a part or appurtenance to the lumber-yard, but as a separate tenement.

John Comstock testified, (page 12:) "My business is that of a land agent, and dealer in lands and city lots; that on or before the seventeenth day of September, 1857, I claimed to be the owner of the east half of lot three; all of lots four and ten, in block forty-nine, of Bigelow & Underhill's addition to Peoria, Illinois; that on that day, for the consideration of three hundred dollars, I conveyed the same to Henry Grove by deed of conveyance, copy of which is hereunto appended, marked (A,) and made a part hereof. I did not claim said lots under Robert Forsyth, James Barton, Charles Ballance, nor any one else in anywise connected with either of them, but I claimed adversely to them. All said lot number four had been sold by John A. McCoy, then Treasurer of Peoria county, at a public sale of lots, at the front door of the Court-House in the city of Peoria, on the 7th day of June, 1855, to one James Dougherty, for the taxes due the State of Illinois and the county of Peoria for the year A. D. 1854, and the certificate of purchase was, for a valuable consideration, assigned by said Dougherty to me. The said east half of lot three, and all of lot ten, in said block forty-nine, were sold to me by said McCoy, at said sale, for the State and county taxes of said year 1854; and two years having expired after said sale, and no one having redeemed said lots, according to law, Francis W. Smith, Sheriff of

Peoria county, and State of Illinois, on the 27th day of June, A. D. 1857, executed to me a deed for said lots, a copy of which is hereunto appended, marked (B,) [page 14,] and made a part hereof. In this matter I acted in the line of my business, without reference to the interest of any one but myself.

Henry Grove swore, (page 18:) "I have examined the foregoing affidavits of Lysander R. Webb, John Comstock, and Hugh Armson, and believe them to be true; so far as the facts come within my knowledge they are true. I did claim said premises, under said deed from John Comstock, as said Comstock has described, and did lease them to Hugh Armson, as set forth in said Webb's affidavit. I did not claim said premises under James Barton, nor under Robert Forsyth. I never had any dealings with James Barton, and do not know that I ever saw him."

This was all the evidence introduced by Barton in support of the motion for a Writ of Restitution, and no fact stated in any of these affidavits was contradicted, or pretended to be contradicted by Forsyth. It is true, his affidavit (page 19) and the affidavit of Mr. Lindsay, (same page,) one of his attorneys, were introduced in his behalf, but instead of disproving anything that is said above, they try to spring two new questions on the Plaintiff: 1st. That after Armson was dispossessed he accepted a lease from Forsyth, and consequently the wrong I complain of was condoned. 2d. That I, who was the landlord of of Barton, am virtually the party taking shelter under the tax title. The first point I may admit to be proved, for Forsyth swears to it, and I have not disproved it; but what does that amount to? After Armson had been dispossessed by the Marshal, under a hab. fa., no act of his could bind his landlord. He had a right to take a lease from Forsyth, and when the Writ of Restitution was executed, he had a right to renew his allegiance to Grove, or his vendee, and so on as often as the Court should change the possession. It is a question in which the tenant has no interest, and in which he ought to have none. He is, by the action of the Court, for the time being, released from all his obligations to his landlord, and the landlord is released from him. As to the second question, I deny that that is proved.

All that Forsyth swears to on this subject, is as follows: "This deponent further states, on his *information and belief*, that Charles Ballance, who was the landlord of the Defendant, James Barton, is the real owner of the title, or claim of title, vested in Henry Grove, as set forth in the affidavit filed in support of the motion herein; and that the motion is now made for the benefit of said Charles Ballance. And Deponent states that the said Grove has not, in person or otherwise, except through the said Charles or his agents, interfered with said property, or in regard to the title claimed to be vested in him; that L. R. Webb, who introduced Armson to Grove, and signed Grove's name to the lease filed, is a son-in-law, and agent of said Ballance." All the rest of his affidavit has reference to the lease to Armson, or to other suits at Peoria about this property, but has no connection with this suit. Lindsay's deposition amounts to nothing; 1st. Because he details acts of Grove, and conversations with him, after Grove had parted with all interest in the matter in dispute. 2d. It was not about this suit, nor in this Court, but about another suit in another Court.

Here was a regular chain of title; a deed from the Sheriff for the taxes to John Comstock, (page 14,) a deed from Comstock to Henry Grove, and a lease from said Grove to Hugh Armson, and positive proof that they held adversely to Barton, Ballance, and Forsyth; and this is only attempted to be counteracted by the above statement of Forsyth after he had had years in which to hunt evidence. The Court deemed it insufficient and granted a Writ of Restitution. About fifteen months afterwards the Court permitted this case to be opened up and re-tried upon the evidence, and no other, except that Messrs. Grove and Ballance were put upon the witness stand and cross-examined. The evidence on this cross-examination was not taken down by either of the parties, each supposing the Judge was doing it; and when the clerk came to make out the record he had nothing to guide him but the scanty minutes the Judge had taken of such expressions as struck his mind as important, and hence the crude. meagre outline found on page 20, which, for want of better, we must take for the evidence on that occasion. It is as follows: Grove said, "know where the land is, described in deed from John Comstock to me. Mr. Webb, son-in-law of Mr. Ballance, told me that Comstock had the title to certain premises on Water street for $300, and money could be made. I wanted him to go shares. He assented, and I told him to buy it. He negotiated with Comstock—so far as I know—got the deed, sent it to me—now produced—and, in pursuance of our understanding, he executed the lease now shown. I conveyed the land to Webb. I never paid anything. Shortly after I heard Armson was disturbed by Forsyth or some one else. I told Webb he might take it, and do the best he could, and if there was anything he might account. I never got any rent nor paid any taxes. I had no knowledge that Webb was acting for Ballance. I understood that Webb bought it for himself and me. Whether Webb paid for it in money or in any other way, I do not know; lease contains property not in the deed; no one in possession when we went to look at the land; have no recollection of any lumber-yard; a little building on the land, on one corner. Armson took possession under the lease—I understood. He took it for a lumber-yard; have no distinct recollection as to the time of Armson's possession. The whole details of the business was done by Mr. Webb. I told him I could not attend to it myself."

As the testimony of Mr. Ballance, upon cross-examination, we have the following on page 21: "Mr. Webb, my son-in-law, has collection of my rents. I told him if he could get the tax title there could be some money made on it: know that $300 were piad. He may have used my money or not. I think I sent Armson to Webb or Grove. Mr. Grove released all claims to me since Webb's death, by a deed, which is as follows:

"This indenture, made this 2d day of July, A. D. 1863, between Henry Grove and Clara B. Grove his wife, of the first part, and Charles Ballance, of the second part, winesseth: That the said party of the first part, for and in consideration of one dollar, lawful money of the United States of America, to them in hand paid, by the said party of the second part, at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have remised, released, sold, and forever quit claimed, and by these presents do remise, release, and forever quit claim, unto the said party of the second part, and to his heirs and assigns forever, all that certain tract of land, known and described as lots three, four, and ten, of block forty-nine, of Bigelow & Underhill's addition to Peoria

(I believe I have heretofore executed a deed for the above premises, either to Mr. Webb or to Mr. Ballance, and if so, Ballance takes this conveyance subject to that former deed.)

To have and to hold said premises, as above described, with the privileges and appurtenances thereunto belonging, to the party of the second part, his heirs and assigns forever.

In witness whereof, said parties of the first part have hereunto set their hands and seals, the day and year first above written.

H. GROVE, [SEAL.]
C. B. GROVE, [SEAL.]

To this is appended the usual proof of acknowledgment.

Now, if there was any doubt before, I insist that this additional evidence puts it beyond all dispute, that from the time that this Court decided against me, until after the death of Col. Webb, I had nothing to do with it. Grove says *Webb* told him Comstock had a title for the premises in dispute, and held it at $300, and that money could be made out of it. They agreed to go shares in the purchase. *Webb* bought the land in his (Grove's) name, and sent him the deed, and made a lease in his name, with his consent, to Armson. When he heard Armson was disturbed, he deeded the land to Webb, and told him to take it, and do the best he could, and if there was anything made he might account. He had no knowledge Webb was acting for me, but understood that he made the purchase for himself and witness. The business was done by Webb. Witness could not attend to it. The deed by which Grove conveyed to me (page 21) is dated on the 2d day of July, 1863, after Webb's death, and contained, in parentheses, the remarkable words, (I believe I have heretofore executed a deed for the above premises, either to Mr. Webb or Mr. Ballance, and if so, Mr- Ballance takes this conveyanc subject to said former deed.)

The sentence in my evidence, (page 21,) that "He may have used my money or not," is liable to comment. That was fully explained in the Court below, but the judge deeming the explanation immaterial, did not write it down. The reason I gave was, that he was a favorite son-in-law, who collected my rents and used my money for his own and my purposes as he chose, and he assisted me to raise the 77th regiment of Illinois volunteers, and went off with said regiment to the war and was killed at the head of it, without ever having settled with me, or rendered to me any account of moneys received and paid out.

But waiving all this, and suppose the Court shall think itself competent to try these matters of fact without a jury, and suppose they shall decide that the purchase from Comstock, and lease from Grove to Armson were made for my benefit, and that I was all the time concerned in this matter personally, as well as a lawyer, then I take the ground that I had a right to do that very thing. When this Court decided against me, as unjust as it was, in my opinion, I submitted, and removed every movable thing from the premises, and they were vacant all summer, and Forsyth or his agents, of whom he speaks, might have taken possession, but they did not do it. Then I insist that I had the same right that any other man had, to buy an adverse title—adverse to both him and me—and go into the vacant premises, and when there, I would have had a right to have this adverse title tested before I could be ousted.

A contrary doctrine would forever preclude the Defendant from buying the land in dispute from any one but the Plaintiff, although a third person may have owned the genuine title at the time.

In the case of Cottingham vs. King, 1 Bur., 629, Lord Mansfield said: "In this fictitious action the Plaintiff is to show the Sheriff, and is to take possession, at his peril, of only what he has title to; if he takes more than he has recovered and shown title to, the Court will, in a summary way, set it right."

In 2 Tidd's Practice, 1248, it is said: "When a stranger turns the plaintiff out of possession, after execution fully executed, the plaintiff is put to a new action, or an indictment for a forcible entry, when the force will be punished. The reason is, that the title was never tried between the plaintiff and the stranger, who may claim the land by a title paramount to that of the plaintiff, or he may come in under him, and then the recovery and execution in the former action ought not to hinder the stranger from keeping that possession which he may have a right to. If the law were otherwise, the plaintiff might, by virtue of a new habere facias, turn out even his own tenants who came in after the execution; whereas the possession was given him only against the *defendant in the action*, and not against others who were not parties to the suit." See on this point, Run. Eject. 489; and Keble, 779.

The verdict formerly was general, as it sometimes is yet, but in this case it was special, describing the property by a description well known, and so was the case of Jackson vs. Rathbone, 3 Cow. 291, and the Court say: "Although upon a general declaration, and verdict and judgment equally general, the plaintiff might take possession at his peril, subject to be set right by the Court, if he took more than the premises in question upon the trial; yet where there is a special verdict, as in this case, locating those premises, the parties and the sheriff should be guided by this." And the counsel in his brief in that case with much good sense, said: "It is not enough to say that the Court will correct the plaintiff if he grasps too much. They ought not to sit still and see an injury committed, because they have the power to redress it."

In the case of Breading's heirs vs. Taylor, 6 Dana, 227, the Court say: "An order for restitution of land which has been delivered under a habere facias is so far final that a writ of error will lie, even while the suit is pending in the Circuit Court;" and "if more land has been delivered under the habere facias than the judgment includes, an order of restitution protanto may be granted."

In the case of Kercheval et al. vs. Ambler, 7 J. J. Marshall, 626, Ambler had a judgment against John Kercheval for a part of the premises which he and Franklin Kercheval occupied, under a lease to Franklin, but this judgment did not include the part on which the dwelling-house stood. He took possession within his recovery, without disturbing Franklin, and without leaving any one in possession to hold it for him. The Kerchevals went on cultivating the land as usual. Forcible entry was sustained against them in the Circuit Court, on the ground that the judgment bound them both, on account of a privity the Court found there was between them, but the Court of Appeals reversed that decision, because the question of privity should have been found by a jury, not by the Court, and because a "judgment in ejectment gives plaintiff therein no right of entry on land in the possession of a person who is neither party nor privy to the judgment."

In the case of Farrow et al. vs. Farrow, 2 J. J. Marshall, 389, the Court say: "When the habere facias issues the plaintiff must, at his peril, obtain possession of no land which was not included by the claim set out in his declaration, and by the verdict and judgment in his favor. If he shall get possession of any more or other land, the party so ejected will have a right to restitution on motion." Simpson's heirs vs. Shannon's heirs, 5 Lett. 323.

In the case ex parte Reynolds, 1 Caine, 500, the judgment was against Low et al. for a whole tract of land. Reynolds was in possession of a part under Low, but had not been made a party to the suit; yet the judgment and writ included his possession, the sheriff turned him out, but the Supreme Court granted him a writ of restitution. See also Jackson vs. Hasbrook, 5 John, 366; and Coleman vs. Henderson, et al., 2 Scam., 252.

In the case of Sloo vs. the Bank of Illinois, 1 Scam., 44, the Court say: "We aver that whenever a decision takes place in any of the Circuit or inferior Courts of this State, which is final, and of which a record can be made, and which shall decide the right of property or personal liberty, complete jurisdiction is conferred on this Court to hear and determine the case."

Coke lays down the law, and all the old writers follow, that "A writ of error lieth when a man is grieved by an error in the foundation, proceedings, judgment, or *execution* in a cause."

In the case of M'Cord's heirs vs. M'Clintock, it appears that M'Cord sued Logan & Talbot and got a decree for certain premises, and sued out a habere facias, in which Sims, a tenant of M'Clintock, was turned out and possession given to M'Cord's heirs. The Court, on motion of M'Clintock, quashed the habere facias and reinstated Sims.

In Roe vs. Dawson, 3 Wills., 49, the ejectment was for ⅝ of a cottage and the sheriff having delivered possession of the whole, the Court made a rule upon him to redeliver possession of ⅜ to the defendant.

As to the fourth point, the proof is clear and uncontradicted, that Forsyth took possession of ground not included in his claim and writ of possession. How much is not made very clear, because immaterial. The dotted lines on the plat, I have prepared to use in the argument, is the line I contend for, and the broken lines show that claim as Forsyth contends for. Forsyth, in his affidavit, does not contradict the statement that this line runs through the house, leaving the door by which men entered, outside of his claim; but that he took possession of that house and holds it yet. See the above cases of Breading's heirs vs. Taylor, 6 Dana, 227; 2 J. J. Marsh., 389; Cottingham vs. King, 1 Bur., 629, and in fact, all the books on Ejectments.

C. BALLANCE.

No. 134

Brief of Mr. Goudy
for deft. in error

Supreme Court of the United States.

JAMES BARTON, vs. ROBERT FORSYTHE. } *Error to Circuit Court of the Northern District of Illinois.*

ARGUMENT FOR THE DEFENDANT IN ERROR.

I.

STATEMENT OF FACTS.

Robert Forsythe, the defendant in error, brought an action of ejectment in the Circuit Court for the District of Illinois, against James Barton, the plaintiff in error, on the 3d day of December, 1850, to recover the possession of French claim No. 27, in the village of Peoria, confirmed to the legal representatives of Michael La Croix, by Act of Congress approved March 3d, 1823, containing 27,449 7-100 square feet, and located on the southeast fractional quarter of section nine, in township eight, north of range eight, east of the fourth principal meridian, according to the survey approved September 1st, 1840.

The defendant below plead the general issue.

On the first trial the verdict and judgment was for the defendant, Barton.

A new trial was granted under the provisions of the Statute of Illinois upon the payment of costs.

A second trial was had, and resulted in a verdict and judgment for the plaintiff, Forsythe.

Barton then paid the costs and obtained a new trial, according to the provisions of the Statute.

The third and final trial was had at the July term, 1856, when a verdict of guilty was returned, and a judgment rendered thereon for the recovery of the land described in the declaration; and a writ of possession was awarded to the plaintiff, Forsythe.

Printed Record, pp. 6, 7.

From this judgment a writ of error was sued out in the hand of Barton, by Charles Ballance, the landlord and real defendant.

The bond was signed by Charles Ballance and Elihu N. Powell, and it recites: "And whereas, said Barton was a transient person, having no interest in said premises, only as a temporary tenant; and whereas said Charles Ballance is the landlord of said premises, and has been defending said suit for his own benefit, and has this day sued out a writ of error to the Supreme Court of the United States to obtain a reversal of said judgment," and bound the said defendant, Barton, or Charles Ballance in his name, to prosecute the writ of error.

Printed Record, p. 8.

At the December term, 1857, the judgment of the Circuit Court was affirmed, and on the 7th of July, 1858, the mandate of this Court was filed below, and a writ of possession and execution were awarded in obedience to the mandate.

Printed Record, pp. 8, 9.

On the 19th July, 1858, a writ of possession was issued by the Clerk of the Circuit Court, in pursuance of the order of the Court aforesaid, commanding the Marshal to put Forsythe in possession of certain property, describing the same set forth in the declaration, *namely*, the whole of French claim No 27.

This writ was executed on the 3d day of September, 1858, by delivering the possession of the property to Forsythe; and on the 1st October, 1858, Ballance paid the costs to the Marshal.

Printed Record, pp. 11, 12.

Mr. Ballance claims in an affidavit that he gave notice of an intention to move for a writ of restitution at the December term, 1858; (*Printed Record, p.* 17.) but nothing appears of record until on the 13th October, 1862, when the *defendant, Barton, by Charles Ballance*, his attorney moved for a writ of restitution, which motion was heard and taken under advisement.

Printed Record, p. 9.

Nothing further appears to have been done until the 15th May, 1863, when the record again recites that *the defendant*, by his attorney, and on affidavits filed, moved the Court that a writ of restitution be awarded *him*, which motion the Court sustained, and ordered that a writ of restitution issue.

Printed Record, page 9.

The facts on which the Court acted in allowing this motion will appear hereafter as they were shown by certain affidavits and exhibits, which were read in evidence on a motion made to restore the possession to Forsythe. They were not preserved in the record at the time the Court ordered the writ of restitution to issue.

On the 27th May, 1863, the Clerk issued a writ of restitution in pursuance of the order last made, and thereby the Marshal was commanded to restore the possession of the whole of French claim No. 27 (describing it fully), *to the defendant below, James Barton.*

This writ was executed "by delivering the possession of the within described real estate to *James Barton's attorney*, as per his receipt above, this third day of June, 1863," and the receipt referred to was signed by Lester Robinson, attorney in fact.

Printed Record, pp. 22, 23.

On the 17th July, 1863, Forsythe moved to set aside the order for a writ of restitution entered in favor of Barton, and to set aside and vacate said writ of restitution and all proceedings thereunder, and to grant him a new writ of possession.

Printed Record, p. 10.

This motion was not finally heard and disposed of until August 9, 1864, when the Court sustained the motion, and ordered a writ of restitution to restore to him the possession of the premises described in the declaration and judgment, to wit: French claim No. 27.

The Court further ordered that the plaintiff, Forsythe, have and recover of the defendant, Barton, his costs and charges in this behalf.

Printed Record, p. 10.

To this order of the Circuit Court in sustaining the motion and allowing a writ of restitution, in favor of the plaintiff below, the *defendant*, *Barton*, excepted, by his attorney, and from this order, the said Barton sued out a writ of error to this Court.

The bond was signed by Charles Ballance.

The question now presented is upon the writ of error from said order.

The facts presented to the Court upon the hearing of the motion have been saved by a bill of exceptions.

Printed Record, p. 10, *et seq.*

They are as follows, to-wit:

1. The writ of possession issued 19th July, 1858, and the return thereon.

2. The motion of the defendant Barton for a writ of restitution, and the papers submitted to the Court for and against the same, consisting of the following papers, to-wit:

(a). Affidavit of Hugh Armson made June 18th, 1862: He swears that in 1858 he called on Charles Ballance to lease lots 3, 4, 9 and 10, in block 49, to use for a lumber yard, that Ballance declined to lease and took him to Henry Grove, who gave him a lease for that ground; that the premises were vacant except a small frame building stood on the most northerly corner, which was used as an office; that he did not know Barton and did not claim under him; that he was turned out by the Marshal who gave possession to Forsythe.

Printed Record, p. 12.

(b). Affidavit of John Comstock made June 13th, 1862: He swears that he claimed to be the owner of east half lot 3 and lots 4 and 10, in block 49, Bigelow and Underhill's addition to Peoria, by virtue of a tax deed dated June 27th, 1857, made exhibit B, and on the 17th September, 1857, he conveyed said lots by quit claim deed, made exhibit A, to Henry Grove: that he did not claim said lots under Forsythe, Barton, or Ballance, but adversely to them all.

Printed Record, pp. 12, 13, 14.

(c). Affidavit by Lysander R. Webb, made June 13th, 1862: He swears that he was acquainted with lots 3, 4, 9, and 10, block 49, Bigelow and Underhill's addition, Peoria, in July, 1858, and before and since; that on the 19th July, 1858, they were vacant, except a small frame office on lot 3, which was unoccupied: Ballance had claimed said lots and had tenants on them, but had abandoned them: In July, 1858, Armson applied to Ballance in Webb's presence to lease the lots, but Ballance declined, because Forsythe had a judgment for them, and he also told Armson that Grove claimed them under a tax title, "and that he (Ballance) did not wish to assume any responsibilities about it;" that he (Webb) went with Armson to see Grove, and with Grove's consent Webb executed in Grove's name a lease to Armson, which is exhibit C; that Armson used the premises about three months when he was turned out by the Marshal.

Printed Record, p. 16.

(d). Affidavit by Charles Ballance, made 13th June, 1862: He swears that he was acquainted with French claim No. 27 and also with lots 3, 4, 9, and 10, Bigelow and Underhill's Addition to Peoria; that previous to the judgment in favor of Forsythe vs. Barton, he claimed to be the owner of said lots 3, 4, 9, and 10 and applied for leave to come in as sole or joint defendant, which was refused; that after the affirmance of the judgement by the Supreme Court, said premises were abandoned and vacant, except a small office standing in the north corner of lot 3; that while so vacant Armson applied to him to rent the same for a lumber yard, which he refused and gave as a reason that Forsythe and Grove both claimed the ground, and Forsythe could obtain a writ of possession; that on the 3d Sept., 1858, Armson was turned out by a Deputy Marshal, and Forsythe put in; that he attached a plat, which he understands to be correct, from which it appears that the whole or a part of the small office was on lot 3 outside the limits of French claim 27, and that Armson was also turned out of that and possession given to Forsythe; that soon after, he, as the attorney of Grove, in the name of Armson, gave notice that he would move the Court to re-instate Armson in the possession of the premises, but the papers had been lost and the motion had not been docketed or any entry made.

Printed Record, pp. 17, 18.

(e). Affidavit of Henry Grove, made October 13th, 1862: He swears that the statements with reference to himself in the affidavits of Webb, Comstock and Armson are true, and that he did not claim the premises under Forsythe or Barton.

Printed Record, p. 18.

(f). Affidavit of Robert Forsythe, made Nov. 4, 1862: He swears that when the writ of possession was served on Armson, he leased the premises of the deponent and occupied them for some time, when Hancock and McCulloch entered under the deponent and yet held the same, and immediately after they took possession actions of ejectment and forcible entry and detainer were commenced against them, and were then pending in the Circuit Court

It will be observed that the motion on which the order complained of was made, was entered on behalf of Barton by his attorney Ballance, and not on behalf of either Armson or Grove.

Ballance was the real owner of the claim of title against Forsythe when this suit was commenced, and Barton was his tenant. Forsythe was adjudged the owner of a paramount title, and after a final decision by this Court, the possession was awarded and given to him. There was, therefore, no further opportunity allowed, by the law, to Barton or Ballance, to claim the possession.

The verdict and judgment was a conclusive bar, both as to the title and possession between Forsythe and Barton, or his landlord Ballance.

Revised Laws Illinois, tit. eject. § 29, *p.* 208.

The Circuit Court treated the matter as finally determined, and in pursuance of the mandate from this Court, ordered a writ of possession to issue for the purpose of putting Forsythe in possession. The writ issued was served and returned executed by delivering possession to Forsythe. The litigation was closed, and the process of the Court executed. Nothing else remained to be done.

Yet we find that the defendant below, Barton, or rather Ballance in his name, enters a motion, some two years thereafter, to restore the possession. The papers presented in support of this motion show the grounds upon which the motion was urged, to be that the Marshal had turned out, by the writ of possession, one Armson, who claimed, under Grove, a stranger to Barton or Ballance, and who claimed to own a tax title adverse to both parties litigant.

This might have furnished Armson or Grove with the proper reasons to make such a motion, and justified the Court in restoring the possession to Armson or Grove. But the Court could not for that reason put Barton or Ballance back into possession. That would be an absurdity. Yet, according to the record, that is just what the Court did do.

Forsythe then entered his motion to undo such proceeding and to give him the fruits of his suit and judgment. The Circuit Court sustained his motion. Ballance was turned out and Forsythe put in. Ballance now complains, in Barton's name, that the Circuit Court erred, and sets up as a ground of error, that because Grove had been wrongfully disturbed in his possession by the first writ of possession, the rights of Barton and Ballance have been revived, the litigation of ten years has been obliterated, and that the judgment of this Court is a nullity.

I beg leave to suggest that the Circuit Court did not in fact make such an absurd decision as the record sets forth. The motion of the defendant in error for the order complained of says that there was a misapprehension and misunderstanding of the facts. (*Printed Record*, *p.* 10) As there was no bill of exceptions showing what the Court acted upon, the "misapprehension" does not appear of record. At the risk of the charge of the impropriety, I must state outside of the record that the Circuit Court intended to restore to Barton the small frame office, or such part of it as stood without the limits of French claim 27, and to which Forsythe's writ did not extend; but by some mistake the Clerk entered the order for a restitution of the whole of French claim 27, and the writ was issued and executed before Forsythe discovered the mistake.

3. Neither the plaintiff in error nor his landlord, the real party, could acquire a new title or claim to the property in dis-

pute, after the commencement of the suit, and assert the same against Forsythe, and thus avoid the bar established by the judgment rendered in this suit. If Ballance purchased, through Webb and Grove, the tax title from Comstock on the 17th September, 1857, before the final judgment in this Court, he could not assert it against Forsythe after the final judgment was entered. And if he had no interest in such tax title before the final judgment, but acquired the same afterwards, as he did do, as proved by himself and Grove, not later than July 2, 1863, he was *estopped* from asserting it against Forsythe.

These points would seem to dispose of the case; but inasmuch as there seems from the record to have been a controversy as to the facts on the hearing of the motion below, it may not be impertinent to refer to such questions as may arise upon them. It is admitted that Armson was in possession of lots 3, 4, 9 and 10, B. 49, Bigelow and Underhill's addition to Peoria, on the 3d September, 1858, and on that day he was dispossessed by the Marshal, under the authority of the writ of possession, in favor of Forsythe *vs.* Barton, of so much of said lots as were situated on French claim 27, the property described in the writ. It is also admitted that Armson held such possession under the lease from Grove, set out on page 15 of the printed record. It also appears without controversy that Grove had no claim to the west half of lots 3 and 4, B. 49, Bigelow and Underhill's addition to Peoria, and that the only claim which he had to the east half of lot 3 and lots 4 and 10, B. 49, in the same addition, was by a deed from Comstock set forth on page 13 of the printed record, and that Comstock's claim of title consisted of a tax deed, exhibited on page 14 of the printed record.

The disputed questions of fact were:

1st. Whether Armson was turned out of the possession of land not described in the writ of possession, namely: a part of the small frame office on one corner of lot 3.

2d. Whether Ballance was the real owner of the claim of title obtained from Comstock.

I consider an enquiry as to the first of these questions immaterial in any point of view.

As to the second question, the record shows that Ballance sent Webb, his son-in-law and agent, to buy the tax title from Comstock; that Webb called on Grove, a friend of Ballance, and made an arrangement by which the tax title was to be bought; that Webb bought it from Comstock and caused the deed to be made to Grove; that the money was probably paid by Webb from money of Ballance in his hands; that the lease was made under the direction of Ballance, by Webb, to Armson, with the verbal consent of Grove, that there was subsequent litigation based on the same facts set up in this record in the Peoria Circuit Court set on foot and managed by Ballance as his own cases, and that Grove had no real interest in the matters; and finally, that Grove made a deed either to Webb or Ballance without receiving any consideration, and after the death of Webb, such deed having been lost, Grove made another deed to Ballance, also without any consideration paid, which is set fourth on page 21 of the Printed Record.

It is clear that Ballance purchased under cover of Grove the tax title from Comstock and caused the lease to be made to Armson, for the purpose of gaining a secret and unjust advantage of his adversary.

This Court not having any knowledge of the proceedings in the Court below, except such as are disclosed by the record, will be at a loss to perceive how such a controversy of fact arose. I can only explain by making a statement outside of the record. The parties acted upon the idea that the motion for a writ of restitution was made in the name of Grove, and, hence, it became material to show that Grove was really Ballance. But I now find the record does not show any such motion.

If by any means these facts can be made material to the inquiry now presented by the record as it stands for the action of this Court, enough appears to show that the possession of Armson, at the time he was ousted by virtue of the writ of possession, on the 3d September, 1858, was in fact the possession of Ballance, the landlord of Barton, and that the Comstock tax title in Grove was a subterfuge. If so, Armson was properly turned out.

Even if the motion had been made by Grove, the Court must necessarily have overruled it.

III.

CONCLUSION.

The plaintiff in error has no merits to urge in support of his allegations of error.

This suit was commenced in 1850, and was thrice tried in the Circuit Court, and once heard in this Court. The defeated party sought to circumvent their successful adversary and snatch from him the fruits of his judgment. The possession was, notwithstanding such device, transferred to the defendant in error. By some means not shown by the record, Ballance got a writ and thereby was restored to the possession, and afterward the Court corrected its erroneous action and executed fully the judgment and mandates of this Court. So far as the proceedings in this suit are concerned, we are now in the *seventeenth* year of its life. Is it not time it should rest?

But it appears that Ballance was not satisfied with prosecuting this litigation in the Courts of the United States. When the writ of the Federal Court was executed on Armson, Ballance commenced an action for forcible entry and detainer, in the name of Armson, before a justice of the peace, was there beaten, and appealed to the Circuit Court of Peoria County, and I am informed that judgment has been rendered therein in favor of Forsythe, and that Ballance appealed again to the Supreme Court of the State, where the case is now pending. At the same time Ballance commenced an action of ejectment, in the name of Grove, in the Peoria Circuit Court; but I have not followed the labyrinths of this litigation far enough to learn what result has been reached in that case. Notwithstanding these appeals to the State tribunals to get back the possession from Forsythe given by the United States Marshal under the process of the Court, Ballance comes into the Circuit Court of the United States with his motion to recover the same possession of the same property; and after being defeated, he is now asking this honorable Court to aid him in this unjust effort.

If it were possible to stay this litigation I would appeal to your Honors to do so, but no earthly power will ever be powerful enough to stop the controversy in regard to the Peoria French claims. We can only hope that it will not descend to the next generation.

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